In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1263

LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,
Petitioner,

vs.

ROBERT ANTHONY WILLIAMS, a/k/a ANTHONY ERTHEL WILLIAMS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Petitioner, Lou V. Brewer, Warden of the Iowa State Penitentiary at Fort Madison, Iowa, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 31, 1974.

OPINION BELOW

The opinion of the Court of Appeals has not as yet been published, and it appears at Appendix A. Appendix B cites the opinion of the District Court.

JURISDICTION

On the 31st day of December, 1974, the Court of Appeals for the Eighth Circuit filed its Opinion and Judgment (see Appendix A). On the 30th day of January, 1975, the Court of Appeals for the Eighth Circuit filed its Order on Petition for Rehearing En Banc (see Appendix C). Upon a motion by petitioner, a Stay of issuance of the mandate was granted on February 6, 1975, provided that an application by the State of Iowa is made to the United States Supreme Court for a Writ of Certiorari (see Appendix D). The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Federal District Court exceed its authority by disregarding the presumption of correctness given state court written findings of fact pursuant to 28 U.S.C. §2554(d) and by resolving disputed facts without conducting an evidentiary hearing as required by *Townsend* v. *Sain*, 372 U.S. 293 (1963)?

2. Can the retention of counsel preclude an accused from waiving his personal constitutional right absent the presence of that counsel?

3. Did the District Court err in disregarding relevant record facts showing a waiver of constitutional rights thereby inappropriately holding that the state failed to meet its burden of proof?

4. Should a more flexible standard be adopted to replace the too restrictive requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966)?

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendments V, VI and XIV of the Constitution of the United States and Title 28 U.S.C. §2254(d) are set forth in Appendix E.

STATEMENT OF THE CASE

Robert Anthony Williams, a/k/a Anthony Erthel Williams, herein referred to as "Williams" was convicted upon jury trial in Polk County District Court of the crime of first degree murder and sentenced to life imprisonment in the Iowa State Penitentiary. The Iowa Supreme Court affirmed the conviction and denied rehearing. *State* v. *Williams*, 182 N.W.2d 396 (1971).

After exhaustion of his state remedies, Williams filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. The petition was sustained. *Williams* v. *Brewer*, 375 F. Supp. 170 (S.D. Ia. 1974).

The judgment of said United States District Court was affirmed by the United States Court of Appeals for the Eighth Circuit on December 31, 1974, on the opinion of a panel of that Court with one Judge dissenting. A Petition for Rehearing En Banc was denied by Order of the Court entered January 30, 1975, Chief Judge Gibson with Judges Stevenson and Webster voting to grant the Petition. A Stay of issuance of the mandate was granted for sixty (60) days on February 6, 1975, provided that the State of Iowa made application to the United States Supreme Court for a Writ of Certiorari.

The Facts

It was about noon of the day before Christmas 1968, and 14-year-old Mark Powers was competing in a wrestling match at the Des Moines YMCA. His proud mother and sister, 10-year-old Pamela, came to watch and cheer him on. As they were going in Pamela, a bright, slightly built little blue-eyed blonde girl, asked her mother if she could have some candy. The child's mother at that time refused but, as parents will, later relented and gave her a quarter to buy a candy bar. Pamela scurried off and returned with her purchase only to remember that just before leaving home she had been cuddling her puppy. Because of this Pamela asked her mother if she could go wash her hands before eating the candy. Her mother said yes and Pamela left, never to be seen alive again by those who loved her.

Sometime after Pamela left, her father, Merlin Powers, and 16-year-old sister Vickie came to join the audience. Pamela's mother asked her husband if he had seen Pamela in the lobby as he came in. The father said no and with growing alarm the anxious parents began to look for their little girl enlisting the aid of YMCA personnel in their frantic search, but to no avail.

Pamela's small body, clad only in a shirt, was found two days later frozen to a culvert on a lonely rural road where Williams had thrown her. Part of her nose had been eaten off by rodents or other small animals. A medical examination showed that little Pamela was dead before being tossed into the culvert.

The examining physician who performed the autopsy testified that 10-year-old Pamela's young body had been sexually ravaged. Seminal fluid was present in her vagina and rectum. The physician stated that there were no

signs of pressure having been applied to the external area of Pamela's neck and throat, but that the interior of the young child's mouth was torn and bruised, with seminal fluid throughout. Death was due to strangulation, "like a baby holding its breath till it gets blue."

Shortly after Pamela disappeared, Williams, a YMCA resident, was seen hurriedly carrying a large bundle from the elevator through the lobby. The bundle was wrapped in an old blanket, and Williams told a bystander that it was a mannequin. Outside, Williams asked a 14-year-old boy to open the door of his car. YMCA personnel assisting Pamela's parents in the search noticed Williams and the "mannequin" and followed him to his car. When approached by these individuals, Williams shoved one of them back, jumped into his car, locked the doors, and sped away. At trial, the boy who opened the car door testified that when Williams put the bundle into the back seat, he "saw two white legs in it and they were skinny and white."

On Christmas Day Pamela's father identified his young daughter's slacks and socks discarded along the interstate east of Des Moines; further along the interstate Williams' car was found in Davenport, Iowa. Early the next day, Williams telephoned his attorney in Des Moines for advice. He was counseled to turn himself in to the authorities and shortly thereafter presented himself to Davenport Police, who arrested him, booked him, and read him *Miranda* warnings. Williams again telephoned his attorney in Des Moines. In the presence of police officers, Attorney McKnight told Williams not to make any statements until he returned to Des Moines. The police officers immediately departed under an alleged agreement not to question Williams until they met with counsel on their return to Des Moines. Williams was again advised of his *Miranda* rights by a state court judge. After arriving in Davenport and before de-

parting for Des Moines, Williams was again informed of his *Miranda* rights. While in Davenport, Williams conferred with an Attorney Kelly on three occasions. There is disputed testimony to the effect that Kelly advised the police that Williams would make no statements until he reached Attorney McKnight and that Attorney Kelly asked Detective Leaming that he be permitted to ride with Williams to Des Moines.

Upon leaving Davenport, Williams initiated conversations with Leaming concerning the police investigation; if the police had checked for fingerprints in his room, and other general conversation. Sometime during the trip, Williams made statements, interpreted by the federal court in contravention of the state court finding of fact, that Williams invoked his constitutional rights.

While en route to Des Moines one of the officers commented that the weather was beginning to turn bad and that discovery of the body and a decent burial for the child might be delayed by snow covering the body. After traveling some distance further, Williams suddenly asked the escorting officers whether the police had found Pamela's shoes and the blanket in which he had wrapped her, and directed them first to a gas station and then to an interstate rest-stop in order to check garbage barrels. As the automobile in which they were riding neared Des Moines, Williams told the officers, "I'm going to show you where the body is." He then guided the officers to a lonely rural road where the young girl's body was found.

REASONS FOR GRANTING THE WRIT

"I. THIS CASE PRESENTS SERIOUS QUESTIONS CONCERNING FEDERAL HABEAS CORPUS REVIEW OF A STATE COURT CONVICTION IN THAT THE

DECISION CONFLICTS WITH *TOWNSEND* v. *SAIN*, 372 U.S. 293 (1963) AND DID NOT COMPLY WITH THE PROVISIONS OF 28 U.S.C. §2254(d).

II. THE DECISION OF THE CIRCUIT COURT CONSTITUTES AN UNWARRANTED EXTENSION OF WAIVER OF THE RIGHT TO COUNSEL AND CONFLICTS IN PRINCIPLE WITH A PRIOR DECISION OF THE EIGHTH CIRCUIT AND DECISIONS OF OTHER CIRCUITS.

III. THIS DECISION IS IN CONFLICT WITH OTHER CIRCUITS IN THAT IT DISREGARDED SIGNIFICANT FACTS RELEVANT TO THE DETERMINATION OF THE ISSUE OF WAIVER.

IV. THE HARSH APPLICATION OF *MIRANDA* v. *ARIZONA*, 384 U.S. 436 TO THIS CASE DEMONSTRATES A SIGNIFICANT NEED TO ADOPT A MORE FLEXIBLE STANDARD TO PROTECT THE RIGHTS OF BOTH THE INDIVIDUAL AND SOCIETY AS A WHOLE.

The state trial court, in determining the issue of waiver, found, on the undisputed state's evidence, that Williams did *not* request assistance of counsel during the trip from Davenport to Des Monies. An opposite finding of fact was made by the Federal District Court after examination of the state court record. Pursuant to 28 U.S.C. §2254(d), a state court's written determination of a factual issue following a hearing is presumed correct in a federal habeas court absent enumerated state proceeding defects. As noted by Judge Webster in dissent, "to the extent that findings of fact were indisputably made by the state trial judge, those facts are to be taken as true unless they fall within the stated exceptions of 28 U.S.C. §2254(d)." None of the enumerated exceptions apply to this written finding of fact.

The language in the bare record interpreted by the federal court as an invocation by Williams of his right to counsel is, as noted by Judge Webster, ambiguous on its face. It is significant that the statement in question was the product of a state's witness, Detective Leaming. A proper interpretation of the testimony rests entirely upon the credibility and demeanor of the witness. While the state trial judge questioned Detective Leaming's candor, he did not find in Leaming's testimony that Williams invoked his right to counsel. Moreover, although Williams testified at the suppression hearing, not an inkling of his testimony indicates he invoked his rights. The findings of the state court must be given great deference for he had the witnesses before him and was in a far superior position to comprehend the true meaning of the testimony.

The Court of Appeals found that the issue of waiver is a federal question. As such, the federal courts are obligated to make their own independent determination. Petitioner suggests that the resolution of the issue of waiver necessarily turns upon the facts. Thus, Petitioner submits the presumption contained in 28 U.S.C. §2254(d) applies to the underlying facts in determining the federal question of waiver. As stated in this Court's decision of *Townsend* v. *Sain*, 372 U.S. 293, 318, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), the precursor of §2254(d): "It is the district judge's duty to apply the applicable federal law to the state court fact findings independently." [See *United States ex rel. Falconer* v. *Pate*, 319 F. Supp. 206 (N.D. Ill. E.D.) for application of 28 U.S.C. §2254(d) to facts of waiver of *Miranda* rights, affirmed, 478 F.2d 1405 (1973)].

The District Court adopted Williams' version of the facts entirely. The court below concedes the discrepancies between the testimony of Mr. Kelly and Detective Leaming exist in the state record. These critical disputed facts

were not, as the Court of Appeals concedes, resolved by the state court. This Court has held that where the merits of a factual dispute were not resolved in a state court, the federal habeas court is obligated to conduct an evidentiary hearing. *Townsend* v. *Sain*, supra. The state, as well as the habeas applicant, is entitled to this hearing. *United States ex rel. McNair* v. *New Jersey*, 492 F.2d 1307 (3rd Cir. 1974). Moreover, as the Court of Appeals points out, other ambiguities exist in the record which were relied upon by the District Court to make its findings. It was incumbent upon the District Court to conduct an evidentiary hearing before resolving critical facts which turn upon the credibility and demeanor of the narrators.

> "Considerations of comity and proper respect for the state courts counsel against precipitous action to invalidate their judgement. If, when viewed against the backdrop of all the facts, the state court decision may be found to be correct, it should not be overturned because it is based on less than all the information which can be made available to the district court." *McNair*, supra.

The lower court's treatment of the facts raises serious problems concerning the role of a federal court on review of a state conviction. If federal courts are hereafter allowed to resolve facts in similar fashion, there would be little purpose in having an original adjudication of federal rights in the state courts. J. Skelly Wright and Abraham D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 Yale L. J. 895, 920-922 (May 1966).

Disregard of the presumption of correctness of 28 U.S.C. §2254(d) and a failure to conduct an evidentiary hearing in violation of this Court's decision of *Townsend* v. *Sain* constitutes error.

The decision below, in effect, places control of the constitutional right to counsel in the hands of counsel rather than the accused.

The Circuit Court enumerated certain facts in determining Williams did not effectively waive his right to counsel. The court found the police made and broke an agreement with defense attorney McKnight: Williams would not be questioned before consultation with McKnight in Des Moines. As pointed out by Judge Webster in dissent, the alleged "broken promise" of Captain Leaming was at the root of the result in this case.

While the breaking of an agreement between police and defense counsel is viewed as questionable police conduct, it cannot preclude Williams from effectively waiving his rights. The Sixth Amendment right to counsel is inherently a personal right, a right only Williams could waive. Counsel cannot make a contractual agreement to limit his client's prerogative to assert or waive a known constitutional right. See *Brookhart* v. *Janis*, 381 U.S. 1 (1966). The situation is analogous to a prosecutor and defense counsel entering a plea of guilty agreement; certainly the defendant is not bound to it. To hold otherwise would contravene the time-tested definition of waiver: "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). The making and breaking of an agreement between counsel and police is completely irrelevant to whether Williams voluntarily waived his right to counsel.

The decision in this case has, in principle, established a rule that an accused cannot effectively waive his right to counsel for purposes of interrogation, absent presence of counsel. The circuits which have dealt with this question conflict in their result. Some in accord with the decision in this case concluded logical extensions of *Massiah*

v. *United States*, 377 U.S. 201 (1964) prohibited interrogation absent counsel's presence. Accord *United States* v. *Durham*, 475 F.2d 208 (7th Cir. 1973). Others in accord with this decision interpreted *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966) to prohibit interrogation unless counsel was present. Accord *Mathias* v. *United States*, 374 F.2d 312 (D.C. Cir. 1967) and *United States* v. *Wedra*, 343 F. Supp. 1183 (S.D.N.Y. 1972). A different panel of the Eighth Circuit in *Moore* v. *Wolff*, 495 F.2d 35 (8th Cir. 1974) rejected this theory. Following the reasoning of *United States* v. *Cobbs*, 481 F.2d 196 (3rd Cir. 1973) and *Coughlan* v. *United States*, 391 F.2d 371 (9th Cir. 1968), that panel resisted any rigid criteria and instead found the test to be whether the accused knowingly, intelligently, and voluntarily waived his rights in the absence of counsel. While the lower court acknowledged *Moore* v. *Wolff*, supra, this decision reflects a contrary result.

Petitioner suggests that the extension of the test of waiver represented by the decision in this case erodes the personal nature of liberties guaranteed in the Constitution by placing the choice of invoking or waiving a constitutional right in the hands of counsel.

In finding that *no* facts existed to support a valid waiver, the Circuit Court ignored clear record facts which other courts have deemed material in a determination of waiver. Curiously, in finding no waiver, the court lists facts which are indicative of an effective waiver. The facts that Williams asked for and obtained attorneys in both Davenport and Des Moines and that the attorneys advised him to make no statements show Williams had knowledge of his rights.

The evidence is undisputed that Williams was given three separate *Miranda* warnings and expressly stated he

understood their meaning. There is no suggestion the warnings did not comport with Constitutional standards. He sought the advice of counsel and was instructed to remain silent. Absent coercion, such evidence reveals any waiver thereafter was intelligently and knowingly made. *Hughes* v. *Swenson,* 452 F.2d 866 (8th Cir. 1971).

Williams, himself, initiated conversations with Detective Leaming. He probed Leaming concerning the police investigations, asking Leaming if the police had checked for fingerprints in his room and if they questioned any of his friends. He asked questions about police procedure and a multitude of other subjects. When an accused, after being advised of his rights, actively seeks to speak with officials about matters under criminal investigation, such action is a strong indication of waiver. *Holloway* v. *United States,* 495 F.2d 835 (10th Cir. 1974); *United States* v. *Cobbs,* supra.

The record clearly shows that the incriminating statements made by Williams were spontaneous, and not the result of police questions. Leaming's statement about the weather and locating the body occurred approximately two hours before Williams made any incriminating statements. There is no evidence to suggest, that within that time interim, Williams was subjected to any interrogation, subtle or otherwise. As they neared the locations where Williams disposed of the incriminating evidence, he suddenly inquired if they had found the shoes, and moments later, the blanket. After leading the officers in a fruitless search for these items, they continued toward Des Moines. As they approached the Mitchellville exit, Williams stated, "I'm going to show you where the body is." He then directed the officers to the body. Volunteered statements are clearly admissible. *Miranda,* supra.

These relevant facts ignored by the lower court, establish that the state met its heavy burden in showing a knowing, intelligent, and voluntary waiver.

Failure to comply with the requirements of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), should no longer be grounds for the exclusion of oral admissions or other evidence which are the results of conversations with a suspect in custody. The holding of the Eighth Circuit in this case substantially formalizes *Miranda* requirements and is a major step in the elevation of form over substance. The decision of *Miranda* v. *Arizona,* supra, must not be allowed to foster the development of legal rituals, comparable to common law forms of action pleading, but demands re-evaluation of rights protection in the light of the changed circumstances of the past nine years.

The requirements of *Miranda* v. *Arizona,* supra, fulfilled a possible need to reform criminal justice procedures and re-orient thinking about the Fifth and Sixth Amendments. Most importantly, it called to the attention of those who enforce the law the Fifth and Sixth Amendments rights. However, the necessity for drastic measures can never be more than temporary and harsh rules must give way to re-evaluation. Today's better trained criminal justice personnel are demonstrating maturity and responsibility and the system as a whole can be trusted not to abuse a more flexible standard which has greater potential for achieving the ends of criminal justice while continuing to protect individual liberties, by applying the Fifth and Sixth Amendments rights with a view to the totality of the circumstances.

Petitioner urges this Court to withdraw the technical requirements of *Miranda* v. *Arizona,* supra, in favor of the more flexible procedures adopted by Congress in the

Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §3501 (1968).

CONCLUSION

For these reasons, a Writ of Certiorari shoud issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

RICHARD N. WINDERS
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Richard N. Winders, Assistant Attorney General for the State of Iowa, hereby certify that on this 4th day of April, 1975, three (3) copies of the Petition for a Writ of Certiorari were mailed, correct postage prepaid, to:

Mr. Robert Bartels
College of Law
University of Iowa
Iowa City, Iowa 52242
Counsel for Respondent

I further certify that all parties required to be served have been served.

RICHARD N. WINDERS
Assistant Attorney General
State Capitol
Des Moines, Iowa 50319
Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1300

Robert Anthony Williams, a/k/a Anthony Erthel Williams,
Appellee,

v.

Lou V. Brewer, Warden,
Appellant.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: September 12, 1974.
Filed: December 31, 1974.

Before VOGEL, Senior Circuit Judge, ROSS and WEBSTER, Circuit Judges.

VOGEL, Circuit Judge.

Appellee, Robert Anthony Williams, was found guilty by jury verdict of murder and sentenced to life imprisonment in the Iowa State Penitentiary. In a five to four decision, the Supreme Court of Iowa affirmed the conviction and denied rehearing. See *State* v. *Williams*, 182 N.W.2d 396 (1971).

After exhaustion of his state remedies, appellee filed a petition for a writ of habeas corpus in the United States District Court[1] on the ground that certain statements made by appellee, and other evidence and testimony obtained as the result of those statements, were improperly admitted into evidence in contravention of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

In a carefully detailed and well supported opinion published as *Williams* v. *Brewer*, 375 F. Supp. 170 (1974), the District Court sustained the petition for a writ of habeas corpus. Timely appeal was made to this court.

We affirm.

Evidentiary Facts.

The attorneys for the parties agreed to submit the case to the District Court on the record of facts and proceedings in the state trial court.

The District Court, in an exercise of its discretion, agreed to review appellee's petition based upon the state court records. *Dempsey* v. *Wainwright*, 471 F.2d 604, 606 (5th Cir. 1973), *cert. denied*, 411 U.S. 968, 93 S.Ct. 2158, 36 L.Ed.2d 690 (1973). The District Court accordingly made its findings of fact, upon which it based its order, without conducting further evidentiary hearings.

The following facts are unchallenged by either party:

On December 24, 1968, the Powers family attended a wrestling tournament in the YMCA building in Des Moines, Iowa. When Pamela Powers, aged 10, failed to return from a trip to the restroom, a search was started.

1. The Honorable William C. Hanson, Chief Judge, United States District Court for the Southern District of Iowa.

The police were called after she could not be located in the building.

Appellee Williams, who had a room on the seventh floor of the YMCA building, was seen in the lobby coming from the elevator carrying some clothing and a large bundle wrapped in a blanket. He spoke to several persons on the way out, explaining to one that he was carrying a mannequin. He requested the aid of a 14-year-old boy to open first the street door and then the door of his Buick automobile parked at the curb. This boy testified that when the appellee placed the bundle in the passenger's seat he "saw two legs in it and they were skinny and white." Efforts by YMCA personnel to view the object were thwarted by the appellee as he closed and locked the car doors and drove away.

On the following day appellee's car was found by police in Davenport, Iowa, approximately 160 miles east of Des Moines. At that time a warrant on a charge of child stealing was issued for appellee's arrest.

Sometime in the morning of December 26, 1968, appellee called from Rock Island, Illinois, to Attorney Henry T. McKnight of Des Moines, Iowa. Mr. McKnight advised the appellee to surrender himself to the Davenport, Iowa, police. Appellee did so.

After the first long distance telephone call from appellee, Mr. McKnight proceeded to the Des Moines police station where he received another long distance telephone call from the appellee, this time from Davenport where he was in police custody. Mr. McKnight, in the presence and hearing of Chief of Police Wendell Nichols and Detective Cleatus M. Leaming, told the appellee that he would be transported from Davenport to Des Moines by Des Moines

policemen, that he would not be mistreated or grilled, that they would talk the matter over in Des Moines, and that appellee should make no statement until he reached Des Moines.

Thereafter, it was agreed that Detective Leaming and Detective Nelson would go to Davenport to pick up the appellee without Mr. McKnight accompanying them, and that the appellee would be brought directly back to Des Moines. Mr. McKnight and the police also agreed that appellee would not be questioned until after he had been returned to Des Moines and consulted with Mr. McKnight.

While the appellee was in Davenport in police custody, and at his request, he consulted with a local attorney, Mr. Thomas Kelly, who thereafter acted in his behalf while the appellee was in Davenport. Mr. Kelly advised the appellee to remain silent until he had arrived in Des Moines and consulted with Mr. McKnight.

After arriving in Davenport and before departing for Des Moines, Detective Leaming advised the appellee of his *Miranda* rights. These rights were not repeated during the trip to Des Moines.

On the trip from Davenport to Des Moines, Detective Leaming and the appellee sat in the rear seat of the car with Detective Nelson driving. Leaming and the appellee engaged in conversation. They discussed religion, appellee's reputation, appellee's friends, police procedures, aspects of the police investigation into this matter, and various other topics.

At this time Detective Leaming knew that the appellee had been a patient in the state mental hospital at Fulton, Missouri, for a period of about three years and that he was an escapee therefrom.

On several occasions during the return trip to Des Moines appellee told Detective Leaming that he would tell him the whole story after he returned to Des Moines and consulted with his attorney, Mr. McKnight.

According to Detective Leaming's own testimony, the specific purpose of his conversation with appellee was to obtain statements and information from appellee concerning the missing girl before the appellee could consult with Mr. McKnight.

The following testimony by Detective Leaming during the hearing on the motion to suppress describes a portion of his conversation with the appellee:

> Eventually, as we were traveling along there, I said to Mr. Williams that, "I want to give you something to think about while we're traveling down the road." I said, "Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way to Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

In response to an inquiry by appellee, Leaming told the appellee that he knew the body was somewhere in the area of Mitchellville, a town 15 miles from Des Moines and along the freeway between Davenport and Des Moines. Leaming later testified that he did not, in fact, know that the body was near Mitchellville.

Shortly before reaching the Mitchellville turnoff, the appellee told Leaming that he would show him where the body was located. Accompanied by other police officers who were following them, they drove to a location designated by the appellee; the body of Pamela Powers was found in a ditch alongside the highway.

Appellee's statements and other evidence obtained pursuant to such statements were admitted into evidence at trial, all over the objections of appellee's attorney.

Challenged Evidentiary Facts.

As noted heretofore, this case was submitted to the United States District Court on the record of the facts and proceedings in the state court. Under such circumstances, a federal court in reviewing an application for writ of habeas corpus is to presume as correct the facts as determined by the state court (subject to various exceptions). 28 U.S.C. § 2254(d).[2]

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2. Section 2254(d) provides:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(Continued on following page)

The appellant contends here that the United States District Court made certain findings of fact contrary to the findings in the state court and therefore violated the provisions of 28 U.S.C. § 2254(d).

The District Court specifically found that Mr. Kelly, appellee's Davenport attorney, had advised Detective Leam-

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Footnote Continued—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

ing prior to his departure from Davenport with the appellee that the appellee was not to be questioned until he got to Des Moines and that Mr. Kelly had asked Leaming that he be permitted to accompany the appellee to Des Moines and that Leaming denied the request.

The District Court also found that Leaming knew that the appellee was a deeply religious person and that he used that knowledge to elicit incriminating statements from the appellee.

The District Court also found that the misstatement by Leaming that he knew the whereabouts of the body of Pamela Powers had a compelling influence on the appellee to make incriminating statements.

A review by this court of the record of the state proceedings reveals certain discrepancies between the testimony of Mr. Kelly and Detective Leaming and certain ambiguities in some of the testimony upon which the District Court relied in making its findings. The record also indicates with regard to the facts challenged here that the state court did not resolve "the merits of the factual disputes." Accordingly, where neither party has requested an evidentiary hearing, the federal court is not constrained in its fact findings by the presumption of correctness to be given findings of the state court. 28 U.S.C. § 2254(d)(1).

This court therefore finds that the District Court correctly applied 28 U.S.C. § 2254 in its resolution of the disputed evidentiary facts, and that the facts as found by the District Court had substantial basis in the record.

Waiver of Constitutional Rights.

Contrary to the findings of the state courts, the United States District Court found that waiver is a question of

law. Appellant suggests that the District Court has mischaracterized the issue of waiver as one of law rather than fact and, in so doing, has erroneously avoided the presumption of correctness to be given to the state courts' factual resolutions.

In this case, the issue of whether appellee waived his right to counsel can best be characterized as an "ultimate fact" or as a "conclusion of fact." The appellation of "fact" or "law" is nevertheless not determinative here. The significant element in deciding the scope of the federal review is that waiver involves the question of whether appellee has exercised or relinquished a *constitutional* right. As such, waiver becomes a federal question about which the federal courts are obligated to make their own independent determination. As said by Mr. Justice Black in *Brookhart* v. *Janis*, 384 U.S. 1, 4, 86 S.Ct. 1245, 16 L.Ed.2d 314, 317 (1966):

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, see, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 70-71, and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464.

See also *Hamilton* v. *Watkins*, 436 F.2d 1323, 1326 (5th Cir. 1970); *Doerflein* v. *Bennett*, 405 F.2d 171 (8th Cir. 1969); *Fugate* v. *Gaffney*, 313 F.Supp. 128, 132 (D. Neb. 1970), *aff'd*, 453 F.2d 362 (8th Cir. 1971), *cert. denied*, 409 U.S. 888, 93 S.Ct. 142, 34 L.Ed.2d 145 (1972).

28 U.S.C. § 2254(d) was not intended to replace this constitutional obligation of the federal court. In *In re*

Parker, 423 F.2d 1021, 1024 (8th Cir. 1970), *cert. denied*, *Parker* v. *South Dakota*, 398 U.S. 966, Judge Lay stated it this way:

> To avoid misunderstanding, the statute does not replace the federal court's constitutional obligation to make its own independent determination on federal questions. The Supreme Court has made clear that a federal court's consideration of the constitutional question shall be plenary. Townsend v. Sain, 372 U.S. 293, 312, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). As Mr. Justice Frankfurter said in Brown v. Allen, 344 U.S. 443, 506, 508, 73 S.Ct. 397, 446, 97 L.Ed. 469 (1952):
>
> "On the other hand, State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide."
>
> * * *
>
> "Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."

The federal court is obligated to make a full and complete review of the records of the state courts in order to comprehend the totality of the circumstances upon which the ultimate question of waiver must be determined. In *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), the United States Supreme Court stated:

> It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. *The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.* (Emphasis supplied.)

See also *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); *Stidham* v. *Swenson*, 15 Crim. Law Rep. 2072 (8th Cir., March 28, 1974).

The District Court found that the state court had applied the wrong constitutional standard in its determination of the issue of waiver by failing to place the burden on the prosecution to show that appellee had waived his constitutional rights. Appellant contests this finding of the District Court.

Miranda v. *Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), places upon the prosecution the heavy burden of demonstrating that the accused knowingly and intentionally waived his privilege against self-incrimination and his right to have counsel present. The The District Court here found that the state trial court failed to place such burden upon the state prosecutor before it allowed into evidence incriminating statements made by appellee to Detective Leaming and that therefore the state court had applied the wrong constitutional standard. Appellant points out that the District Court may properly assume, in the absence of evidence to the contrary, that the state court applied correct standards of federal law to the facts when the state court does not

articulate the constitutional standards applied. *Townsend* v. *Sain*, 372 U.S. 293, 314-315, 83 S.Ct. 747, 9 L.Ed.2d 770 (1963).

A review of the record here, however, discloses no facts to support the conclusion of the state court that appellee had waived his constitutional rights other than that appellee had made incriminating statements. Although oral or written expression of waiver is not required, waiver of one's rights may not be presumed from a silent record. *Miranda* v. *Arizona*, *supra*, 384 U.S. at 475; *Carnley* v. *Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70, 77 (1962). The District Court here properly concluded that an incorrect constitutional standard had been applied by the state court in determining the issue of waiver.

Further, the resolution of the waiver issue by the state court, although after fair consideration and following procedural due process, cannot be accepted as binding when it has misconceived a federal constitutional right. *Brown* v. *Allen*, 344 U.S. 443, 506, 73 S.Ct. 397, 437, 97 L.Ed. 469 (1953); *Townsend* v. *Sain*, *supra*, 372 U.S. at 318; *Doerflein* v. *Bennett*, *supra*.

Appellant points out that this court recently held that an accused can voluntarily, knowingly and intelligently waive his right to have counsel present at an interrogation after counsel has been appointed. See *Moore* v. *Wolff*, 495 F.2d 35 (8th Cir. 1973). The prosecution, however, has the weighty obligation to show that the waiver was knowingly and intelligently made. We quite agree with Judge Hanson that the state here failed to so show.

In this case, appellee had obtained counsel in both Des Moines and Davenport and had been advised of his *Miranda* rights prior to departure from Davenport. Once the *Miranda* warnings have been given, the subsequent

procedure to be followed by the police is well set forth by the Supreme Court as follows:

> Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.* At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. *Miranda* v. *Arizona*, *supra*, 384 U.S. at 473, 474. (Emphasis supplied.)

The facts in this case clearly indicate that the appellee told Detective Leaming several times during the automobile trip to Des Moines that he would tell the whole story *after* consulting with Mr. McKnight. Despite this indication by appellee that he wished to delay his statement until he had consulted with his attorney in Des Moines, Detective Leaming persisted in his "conversation" with appellee with the admitted intent of obtaining information before their arrival in Des Moines and appellee's consultation with his attorney there. By means of a subtle form of interrogation, Leaming did obtain the incriminating statements from appellee.

It is pointed out by Judge Hanson, and also noted by the state courts, that there was an agreement between the Des Moines police and appellee's Des Moines attorney that appellee was not to be questioned before he reached Des Moines. Although we deem it immaterial, there is substantial justification for the conclusion that Detective Leaming was aware of such agreement. In any event, Leaming violated the terms of the agreement when he engaged in his subtle conversation with the appellee with the specific and admitted intent of soliciting incriminat-

ing statements before their arrival in Des Moines and appellee's consultation with Attorney McKnight.

The "particular facts and circumstances surrounding [this] case, including the background, experience, and conduct of the accused" referred to by the Supreme Court in *Johnson* v. *Zerbst*, *supra*, might be partially enumerated as follows: (1) The appellee was an escapee from a mental institution wherein he had been confined for approximately three years; (2) appellee asked for and obtained an attorney to represent him at each end of the trip between Davenport and Des Moines; (3) Mr. Kelly, appellee's Davenport attorney, had asked permission to accompany the appellee on the trip from Davenport to Des Moines, which permission was denied by the police; (4) both attorneys had advised appellee not to make any statements until after arriving in Des Moines and consulting with Attorney McKnight; (5) appellee gave several indications that he did not want to talk about the case until *after* he arrived in Des Moines; (6) appellee stated a number of times that he would talk about the case *after* he had seen Attorney McKnight in Des Moines; (7) by suble interrogation Detective Leaming got the appellee to make incriminating statements used to convict him; (8) the police violated an agreement they had with Attorney McKnight that the appellee was not to be questioned before consultation with Mr. McKnight in Des Moines. Cf. *Massiah* v. *United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); *United States ex rel Magoon* v. *Reincke*, 304 F.Supp. 1014, *aff'd* 416 F.2d 69 (2d Cir. 1969); *Taylor* v. *Elliott*, 458 F.2d 979 (5th Cir. 1972), *cert. denied*, 409 U.S. 885, 93 S.Ct. 117, 34 L.Ed.2d 142 (1972).

Under all of these circumstances, we find that Judge Hanson was eminently correct in holding that the appellee's constitutional rights had been violated in that he was

denied the right to counsel and that he had not voluntarily, intelligently and effectively waived his rights.

The decision and order of the District Court are affirmed. WEBSTER, Circuit Judge, dissenting.

I must respectfully dissent.

This habeas corpus case was tried to the District Court by stipulation on the record of the state court proceedings. To the extent that findings of fact were indisputably made by the state trial judge, those facts are to be taken as true unless they fall within the stated exceptions of 28 U.S.C. §2254. See note 2 of the majority opinion, *supra*. To the extent that additional facts were found by the District Judge upon his review of the bare record, without having heard any of the witnesses, we need give such findings no special deference since the District Judge was in no better position to make credibility judgments than we find ourselves today. But conceding for purposes of this opinion each of the so-called disputed facts as found by the District Judge, I find myself in disagreement with the ultimate conclusions reached in the majority opinion that Williams "was denied his right to counsel and that he had not voluntarily, intelligently and effectively waived his rights."

I.

It is not disputed that Williams was advised of his full *Miranda* rights on three occasions: by Lieutenant Ackerman of the Davenport Police Department, by the state judge before whom he was brought upon his arrest and by Captain Leaming upon his arrival in Davenport. There is no suggestion that the advices given did not comport with Constitutional standards or that Williams did not understand their meaning. He expressly stated that he did, and therefore understood, as he was told, that he had

the right to remain silent and to be represented by an attorney during questioning. That Williams had thus received effective advice appears to be conceded by the majority. We must next proceed to a consideration of whether Williams thereafter intelligently and knowingly declined to exercise his rights. *Hughes* v. *Swenson,* 452 F.2d 866 (8th Cir. 1971).

At the time of his arrest, Williams had already retained Henry McKnight, a Des Moines attorney. McKnight advised him by telephone not to talk with the police until he returned to Des Moines. While in court at Davenport, Williams observed and asked to speak with a local attorney, Thomas Kelly. Kelly conferred with Williams two times in private. According to Williams, Kelly then advised the police that Williams wouldn't be talking to them until his return to Des Moines. Thus it is clear to me that Williams was not only aware of his right to counsel, he sought and received the advice of two attorneys and knew that both of them thought he should remain silent. The inference is clear that—putting aside any question of coercion—any waiver thereafter was intelligently and knowingly made. *Hughes* v. *Swenson, supra.*

The District Judge held Williams could not effectively waive counsel for purposes of interrogation in the absence of counsel. This was error. While recognizing that the burden of showing a knowing and intelligent waiver is a heavy one, we have held that such waiver can occur notwithstanding that counsel has been appointed. *Moore* v. *Wolff,* 495 F.2d 35 (8th Cir. 1974). Waiver is to be judged from the whole record. *United States* v. *Harden,* 480 F.2d 649 (8th Cir. 1973). Express words of waiver are not required. *Hughes* v. *Swenson, supra; United States* v. *Montos,* 421 F.2d 215, 224 (5th Cir.), *cert. denied,* 397 U.S. 1022

(1970); *United States* v. *Ganter,* 436 F.2d 364, 369-370 (7th Cir. 1970); *United States* v. *Hilliker,* 436 F.2d 101, 102-03 (9th Cir. 1970), *cert. denied,* 401 U.S. 958 (1971); *Bond* v. *United States,* 397 F.2d 162, 165 (10th Cir.), *cert. denied,* 393 U.S. 1035 (1968).

The record reveals that as the police car began its return trip from Davenport to Des Moines, the car was driven by Detective Nelson, with Captain Leaming and Williams in the back seat. After a while Williams opened up a conversation, asking such questions as whom the police had talked to and whether there were any fingerprints. They also talked about police procedures, religion, youth groups and singing. Eventually Leaming made his observation about the weather and expressed the hope that Williams would agree to stop and locate the body. (Quoted in majority opinion at 5.) He prefaced his statement by saying this was something he wanted Williams to think about as they were travelling down the road. He concluded this statement with another statement, not quoted in the majority opinion:

> I do not want you to answer me. I don't want to discuss it any further.

The record reveals that sometime later, without any further reference to Leaming's suggestion, Williams suddenly asked, "Did you find her shoes?" He then directed them to a filling station, where they made a fruitless search for the child's shoes. They returned to the freeway, and as they passed a rest area on their left, Williams asked, "Did you find the blanket?" He then told them he had disposed of the blanket at the rest area. They turned around and returned to the rest area. They did not find the blanket because it had already been located. Again they returned to the freeway and resumed their journey toward Des Moines. Still some distance east of

Mitchellville, Williams suddenly said, "I'm going to show you where the body is." They exited from the freeway at the turn-off indicated by Williams, and after one or two false turns, finally came to a place in the road where the body was located in the snow.

Against this massive evidence of knowing and intelligent waiver of the right to silence and to counsel during interrogation, the only fact asserted to the contrary is the statement of Williams, made several times according to Leaming, that "[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." First, this statement is ambiguous on its face. I do not find in this assurance of cooperation an indication "in any manner" that Williams wished to refrain from giving information. *See Miranda* v. *Arizona*, 384 U.S. 436, 473-74 (1966). There is absolutely nothing in the record to suggest that these statements were made in response to questions by Leaming; rather, the evidence is that prior to Williams' statement that he was going to show them where the body was neither police officer was putting questions to Williams. Williams brought up the shoes, Williams brought up the blanket and Williams volunteered the statement that he was going to show them the location of the body.[1]

1. If, as the state judge found, an agreement not to question Williams in the car had been made with counsel, this agreement could hardly be said to preclude a waiver of counsel during a pretrial conversation, regardless of the serious reflection thereby cast upon the police procedures employed. It is the accused in custody who waives, not his counsel, and Williams was never at any time told in any way that he had lost either his right to remain silent or to have counsel present during an interrogation. Neither does the record warrant any inference of incapacity because Williams happened to be an escapee from a mental institution. The state district judge ruled against Williams on this point, permitting this fact in evidence only as bearing upon his criminal intent, and the point is not preserved on this appeal.

It has been suggested that Williams' admissions were obtained by ruse and that his Sixth Amendment rights were thus violated. The District Judge's reliance upon *Massiah* v. *United States*, 377 U.S. 201 (1964), is misplaced. There is no doubt that Williams was in custody and entitled to counsel unless waived. The difference between this case and *Massiah*, however, is that Williams *knew* his statements were being noted by police officers, and he had been expressly warned that such statements could be used against him.

I entertain grave doubts whether a federal judge should undertake to decide issues of credibility from a bare record without an independent evidentiary hearing. It was from such findings that the District Judge concluded that Leaming had contrived to thwart Williams' attorneys and thereby deprive him of assistance of counsel. The state trial judge who heard the evidence concluded otherwise; his assessment was sustained by the Supreme Court of Iowa, and I likewise believe the record supports the conclusions of waiver reached in the state proceedings.

II.

A distinct but factually related issue to be resolved is whether Williams' statements were involuntary and therefore produced in violation of his Fifth Amendment rights. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); *see Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

No promises were made to Williams, and the record does not support any inference that the statements resulted from this sort of inducement. *See Hunter* v. *Swenson*, No. 74-1261 (8th Cir., October 24, 1974); *United States*

v. *Johnson*, 466 F.2d 1210 (8th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973).

I am equally unpersuaded that the conversations in the police automobile, or, for that matter, the totality of the circumstances were so coercive that the statements of Williams must be considered the product of a will overborne. *See Townsend* v. *Sain*, 372 U.S. 293 (1963); *Iverson* v. *North Dakota*, 480 F.2d 414 (8th Cir.), *cert. denied*, 414 U.S. 1044 (1973). Williams himself initiated the discussions related to the crime. Williams himself asked questions about the investigation. He was not subjected to an intrusive examination. Each significant statement (the shoes, the blanket, the location of the body) was triggered, not by a police question, but by something Williams saw as they travelled along the freeway—a filling station, a rest area, an exit ramp.[2]

Certainly, Officer Leaming planted a thought that it would be useful and decent to locate the body as they passed through the area. But he also told Williams not to answer—just to think about it. If such conversations can be deemed coercive, we will have turned the criminal justice system upon its head. As Mr. Justice Cardozo once wrote:

> [J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.
>
> *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934).

---

2. Williams testified at the suppression hearing and once again during the trial, in chambers. He asserted nothing in such testimony from which the reviewing court could find additional evidence of mistake or coercion.

III.

I have carefully reviewed the record of the entire state proceedings. What transpired in the police automobile is clear. Williams understood his rights; he was promised nothing; he was not coerced. To say this much is not to approve of any techniques which involve misrepresentations to counsel, if in fact Leaming was guilty of such acts as the District Judge found. But addressing myself to the findings of the state district judge, I believe they are supported by the record. We should not advance the Constitutional protection of the Fifth and Sixth Amendments to strike down admissions knowingly and intelligently made after full *Miranda* warnings and advice of counsel on such unsupported factual inferences as that Williams "gave several indications that he did not want to talk about the case until *after* he arrived in Des Moines." (Majority opinion at 17.) A fair reading of the record is that each statement was not in response to a specific inquiry but was spontaneous. *See United States* v. *Stabler*, 490 F.2d 345, 350-51 (8th Cir. 1974).

This was a brutal crime.[3] The evidence of Williams' guilt was overwhelming. No challenge is made to the reliability of the fact-finding process; the statements dealt not with guilt but with the location of evidence, and were corroborated by other evidence. I cannot but assume that the alleged "broken promise" of Captain Leaming is at the root of the result reached in this case. If, as I believe, there was no violation of Williams' Fifth or Sixth Amendment rights, then the effect is to apply the federal exclusionary rule in a state case to improve future police

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3. The medical examiner testified that he found positive evidence of seminal fluid in the mouth, rectum and vagina of the body of the ten-year-old child. Death was by suffocation.

procedures. This is not the case in which to make that point. *See Michigan* v. *Tucker*, 42 U.S.L.W. 4887 (U.S. June 10, 1974).[4]

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

The District Court opinion and judgment is reported at 375 F. Supp. 170 (1974).

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4. Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require tha policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.

42 U.S.L.W. at 4891.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1300

September Term, 1974

Robert Anthony Williams, etc.,
Appellee,

vs.

Lou V. Brewer, etc.,
Appellant.

Appeal from the United States District Court for the Southern District of Iowa

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

Chief Judge Gibson with Judges Stephenson and Webster voted to grant the petition for rehearing en banc.

January 30, 1975

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1300

September Term, 1974

Robert Anthony Williams, a/k/a
Anthony Erthel Williams,
Appellee,

vs.

Lou V. Brewer, Warden of the Iowa State Penitentiary
at Fort Madison, Iowa,
Appellant.

Appeal from the United States District Court for the
Southern District of Iowa.

On Consideration of Appellant's motion for stay of mandate, it is now here ordered by this Court that appellant's motion for stay of mandate in this cause be granted pursuant to the following conditions:

The writ of release from custody should not issue for a period of sixty (60) days from the date of this order.

The writ shall be suspended if the State of Iowa pursues a new trial within the 60-day period.

Further, an application by the State of Iowa to the United States Supreme Court for a writ of certiorari shall stay the mandate of this Court. Should the Supreme Court deny review, the State of Iowa shall have 60 days from the date certiorari is denied in which to pursue a new trial.

Should the State of Iowa fail to pursue a new trial within 60 days from the date of this order or from denial or certiorari by the United States Supreme Court, appellee must be released from custody.

February 6, 1975

APPENDIX E

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Constitution of the United States, Amendment XIV:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28 U.S.C. §2254(d):

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> "(1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> "(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> "(3) that the material facts were not adequately developed at the State court hearing;

> "(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> "(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> "(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> "(7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> "(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to

establish by convincing evidence that the factual determination by the State court was erroneous."

Title 18 U.S.C. §3501, Omnibus Crime Control and Safe Streets Act of 1968:

"§3501. Admissibility of confessions

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

"(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such

defendant was without the assistance of counsel when questioned and when giving such confession.

"The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

"(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offense against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

"(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at

which the person who made or gave such confession was not under arrest or other detention.

"(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

"Added Pub L. 90-351, Title II, §701(a), June 19, 1968, 82 Stat 210, and amended Pub L 90-578, Title III §301(a) (3), Oct. 17, 1968, 82 Stat 1115."

APPENDIX

In The

Supreme Court of the United States

October Term, 1975

—o—

No. 74-1263

—o—

LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS, a/k/a ANTHONY ERTHEL WILLIAMS,

Respondent.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 5, 1975

CERTIORARI GRANTED DECEMBER 15, 1975

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Date		
1969		
May 6	Ruling [Motion to Suppress Evidence]	

SUPREME COURT,
STATE OF IOWA:

1970		
December 15	Opinion	

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF IOWA:

1972		
October 16	Petition for Writ of Habeas Corpus	
1974		
March 28	Memorandum and Order	
April 11	Respondent's Notice of Appeal	

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT:

1974		
December 31	Opinion	
December 31	Judgment	
1975		
January 14	Petition for Rehearing and Suggestion for Rehearing En Banc	
January 30	Order [Denying Petition for Rehearing En Banc and for Rehearing]	
January 30	Application for Stay of Mandate	
February 6	Order [Staying Mandate]	

On the 6th day of May, 1969, the Polk County District Court entered the following ruling on the Respondent's Motion to Suppress Evidence:

CRIMINAL NO. 55805

STATE OF IOWA,
Plaintiff,

vs.

ANTHONY ERTHELL WILLIAMS,
Defendant.

RULING

* * *

Defendant's motion to suppress evidence, filed March 25, 1969, went to hearing on April 2, evidence being offered by both parties. The Court finds as a fact that the return trip from Davenport to Des Moines, the subject of the evidence, and the source of the information from the Defendant sought to be suppressed, was a critical stage in the proceedings requiring the presence of counsel on his request. The Court further finds that an agreement was made between defense counsel and the police officials to the effect that the Defendant was not to be questioned on the return trip to Des Moines; rather, that he would talk to police officials, with his attorney, on arrival in Des Moines. Even if such agreement were violated, it could not be the foundation for suppression, but it does serve the purpose of helping to establish the Defendant's state of mind as to whether he would or would not give information before seeing his attorney in person.

However, based on the evidence at the hearing, the Court finds as a fact that the Defendant did voluntarily give information to the officers and thus waived his right to have an attorney present during the giving of such information. It is clear from his testimony and the other testimony that he was well aware of his rights and understood them well. The time element involved on the trip, the general circumstances of it, and more importantly the absence on the Defendant's part of any assertion of his right or desire not to give information absent the presence of his attorney, are the main foundations for the Court's conclusion that he voluntarily waived such right. There is no question but that he could change his mind from what it was at the Davenport Police Station and thereafter intelligently and informedly waive his right to the presence of his counsel. This finding of fact is made by the Court

even though the Court is not entirely convinced that Chief of Detectives Leaming testified with complete candor at this hearing, regarding the "agreement" with Defendant's attorney.

These findings are made beyond a reasonable doubt.

/s/ J. P. Denato
Judge

On December 15, 1970, the following opinion was issued by the Supreme Court of Iowa:

STATE of Iowa, Appellee,

v.

Robert Anthony WILLIAMS, a/k/a Anthony Erthel Williams, Appellant.

No. 53743

LARSON, Justice.

Pursuant to indictment charging defendant with the crime of murder, in violation of sections 690.1 and 690.2 of the 1966 Code, filed in Polk County District Court on February 6, 1969, a plea of not guilty was entered and trial by jury began on April 30, 1969. A verdict of guilty was returned on May 6, and on May 14 defendant was sentenced to imprisonment for life as provided by section 690.2 of the Code. He appeals. We affirm.

As grounds for reversal appellant contends (1) that the trial court erred in overruling his motion to suppress the State's evidence offered by all witnesses as to admissions against interest, statements, demonstrations and confessions made by him while in police custody on an automobile trip from Davenport to Des Moines, Iowa, on December 26, 1968; (2) that evidence of admissions against interests, statements and confessions made by defendant should not have been admitted in evidence at the trial because it was violative of the Fifth and Sixth Amendments to the Constitution of the United States and under the Constitution of the State of Iowa, and the waiver of those rights had not been demonstrated. In short, it is appellant's contention that under

these constitutions and the decisions of the courts since the Escobedo and Miranda cases the State failed to sustain its burden to show the defendant voluntarily gave the officers with whom he was riding information, some of which led to the discovery of the body of the murdered child, and that he knowingly and intelligently waived his right to remain silent and to have the assistance of counsel at the time of giving that information.

We shall presently discuss the propositions advanced by appellant to sustain his contentions, but first we set out a short statement of the circumstances surrounding the crime and the apprehension, custodial treatment, and transportation of defendant to Des Moines on December 26, 1968.

On December 24, 1968, the Powers family attended a wrestling tournament in the YMCA building in Des Moines, Iowa. When Pamela Powers, age 10, failed to return from a visit to the washroom a search was started for her, but she could not be found in the building, and the police were called. About that time, or between 1 and 1:30 P.M., the defendant Williams, who had a room on the seventh floor of the building, was seen in the lobby coming from the elevator carrying some clothing and a large bundle wrapped in a blanket similar to those provided in the YMCA rooms. He spoke to several persons on the way out, explaining to one party that he was carrying a mannequin. He requested the aid of a 14-year-old boy to open first the Locust Street door and then the door to his Buick automobile parked on the south side of the street facing east. This boy testified that when the defendant Williams placed the bundle in the passenger seat he "saw two legs in it and they were skinny and white." Efforts by YMCA personnel to view the object were thwarted by defendant as he closed and locked his car doors and drove away. They also called for the police.

Pursuant to an A.P.B. put out by the Des Moines police department defendant's Buick car was found in Davenport, Iowa, on December 25, 1968, and a search for him in that area was made by Davenport, Des Moines, and State Bureau of Criminal Investigation officers.

On the morning of December 26 at about 8:45 A.M. Mr. McKnight, a well-known Des Moines attorney, came to Detective Leaming's office at the Des Moines police station and informed the officers present that Williams was going to surrender and there would be a telephone conversation with him at Davenport around 9 A.M. A call was received about that time from the Davenport

police advising that Williams had turned himself in and, at Williams' request, he was permitted to talk to Mr. McKnight, who allegedly then told Williams not to talk until he arrived back in Des Moines and saw McKnight. Contending the officers heard that admonishment and agreed not to interrogate Williams before they arrived back in Des Moines, McKnight assured Williams he would be in the custody of good officers and would be safe. Captain Leaming and Detective Nelson were then dispatched to Davenport to bring Williams to Des Moines. On the return trip Williams made statements and revelations which became the subject of defendant's motion to suppress and the waiver issues involved herein.

[1, 2] I. The concept of waiver of one's constitutional rights during the various stages of the criminal process, it is said, has long been recognized by the courts. 21 Am. Jur. 2d, §§ 219, 316, 317. Also see State v. McClelland, Iowa, 164 N.W. 2d 189, 195; Mullaney v. State, 5 Md. App. 248, 246 A. 2d 291, 301; State v. McPherson, Iowa, 171 N. W. 2d 870, 873; Land v. Commonwealth, 1970, Virginia Supreme Court of Appeals, 176 S.E. 2d 586. Almost all of the protections which the federal and state constitutions provide for the citizen, such as the Sixth Amendment's right to counsel and the Fifth Amendment's privilege against self-incrimination, may be relinquished by him. Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. Vol. 19, Am. Jur. Proof of Facts, Annotated, Waiver of Rights under Miranda, contains an excellent review of the entire subject, § 1, p. 3 to § 50, p. 85, inclusive. Waiver has often been defined in this regard as "an intentional relinquishment of or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A. L. R. 357; State v. Kartson, 247 Iowa 32, 72 N.W. 2d 463; People v. Marsh, 14 Mich. App. 518, 165 N.W. 2d 853 (1968); Babbs, Inc. v. Babb, Iowa, 169 N.W. 2d 211 (1969); Broadbent v. Hegge, 44 Wis. 2d 719, 172 N.W. 2d 34 (1969). Miranda is not unique in its affirmation of the traditional concept of the ability and right of an accused to waive his fundamental constitutional rights with or without his counsel's consent or presence during the pretrial stages of the criminal process. See Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977. Nor is it especially distinctive in its specific holding that the right to counsel and the privilege against self-incrimination may be waived by an accused during the period of custodial interrogation. State v. Clough, 259 Iowa 1351, 147 N.W. 2d 847; State v. Sanders, 276 N.C. 598, 174 S.E. 2d 487 (1970). The Miranda decision is significant because of its acquiescence with the Escobedo rule that counsel is essential during the in-custody interrogation if he is to be of meaningful assistance to his client, because of its skeptical attitude toward what precisely is a waiver "knowingly and intelligently" made, and because of its uncomprising delineation of the evidentiary requirements which must be met by the prosecution to "demonstrate" a valid waiver.

[3, 4] Thus, the rule we draw from Miranda and subsequent high court decisions is that whenever a person is taken into custody or his freedom of action is restrained by law enforcement officers "in any significant way" and after he has been given the required warnings, several choices or alternatives of action are open to him. (1) He may decide to waive the right to consult with and have counsel present with him during the interrogation, relinquish his privilege against self-incrimination, and respond to the questions or suggestions of the officers. Clearly, such a waiver may be made after the accused has discussed the matter with an attorney who has explained the potential ramifications of his decision. Miranda, however, does not require the accused to consult with an attorney before he makes the waiver decision. He may do so right after receiving the warnings or later and in the total absence of advice from counsel. See Miranda v. Arizona, supra, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, at page 723; Vol. 80, Harvard Law Review, p. 204. (2) The accused, after waiving his rights and responding to some questions and giving some information, may decide to cut off the questioning and exercise his privilege of silence and his right to immediate aid of counsel. Once he has manifested that intention, further interrogation must cease until his attorney is present.

[5] It also appears from Miranda that the accused may limit the scope and ambit of the interrogation and, when this limited waiver is enunciated, it must be respected, and of course if he is unsure of whether he should make a statement and requests the assistance of counsel, that request must be honored and further interrogation must cease until he has consulted with an attorney and thereafter consents to be questioned or voluntarily and willingly gives information. Futhermore, if he is indigent and requests counsel be appointed for him, this must be done and a reasonable opportunity afforded to confer with counsel.

[6] Waiver, of course, may not be presumed from a silent record, but neither is an oral or written expression required. A waiver may be found from an examination of all the attendant facts and circumstances. In Johnson v. Zerbst, supra, it is stated

that determination must depend on the facts and circumstances of each case. "Despite the fact that the testimony does not show an express waiver of appellant's right to remain silent and to counsel, we hold that the totality of the circumstances—the attendant facts of the case—are such as implicitly show that appellant voluntarily and intelligently relinquished these rights when he made his incriminating admissions." Mullaney v. State, supra, quoted with approval by us in State v. McClelland, supra at page 195 of 164 N.W. 2d.

[7, 8] In summary, Miranda devoted its principal attention to the issue of voluntariness in giving of waivers, and laid down certain requirements to guide and assist trial courts in resolving the question of voluntary waiver when it arises, either on a pretrial motion to suppress a defendant's statement or demonstration, or on a voir dire examination at trial. Although, in motions to suppress, questions involving the evaluation of credibility such as whether a certain statement was or was not made (the well-known swearing contest) the trial court must in the first instance pass judgment thereon, that determination is subject to our review. State v. Leiss, 258 Iowa 787, 791, 140 N.W. 2d 172, 175. Also see Vol. 19, Am. Jur. Proof of Facts, Waiver of Rights under Miranda, § 45 and citations. Thus, the appellate court has the duty to review rulings, in voir dire or in the trial proper, to see that the accepted statements are supported by other persuasive evidence and that none of the strict rules of proof set out in Miranda were violated by the trial court in passing on the admissibility of evidence produced on the issue as to whether the accused waived his right to remain silent and to have the present assistance of counsel. To that extent we review the facts. See Greenwald v. Wisconsin, 390 U. S. 519, 88 S. Ct. 1152, 20 L. Ed. 2d 77, which required a review of the facts previously found sufficient to constitute a waiver.

[9] In any event, we give weight to the trial court's findings of fact, but are not bound by them (Rule 344(f)(1), R. C. P.), and note that the rules as announced in Miranda require generally that the State "demonstrate" to *our* satisfaction that defendant had been duly advised of his constitutional rights prior to the statements or information given, that he voluntarily, knowingly, and intelligently made the alleged statements after the warnings were given to him, and that they were not secured by force, threats or promises, or by artifice, deception, trickery or fraud. Failure to so demonstrate compliance with these requirements, of course, would call for a rejection of a claim of waiver by an appellate court.

[10] In passing on the adequacy of the State's showing in these regards, we have recognized the totality-of-circumstances test for a showing of waiver of constitutionally-protected rights in the absence of an express waiver. After a careful review of the circumstances shown herein, we must conclude as did the trial court that they were sufficient to admit into evidence before the jury the incriminating statements and the information obtained from Williams on his in-custody automobile trip from Davenport to Des Moines.

II. It appears from this record that defendant first filed a pretrail motion to suppress, alleging the information obtained from him by Captain Leaming was secured in such a way as to violate defendant's right under the Sixth Amendment to counsel or to counsel's present assistance, and to violate an alleged agreement between the officer and defendant's counsel that there would be no interrogation of defendant until their return from Davenport.

In his standing objections, timely made during trial and overruled by the court, defendant also maintained all information obtained by or through Leaming on his trip from Davenport in the Des Moines police car was secured in violation of the Fifth and Sixth Amendments to the federal constitution and of the due process clauses of the state and federal constitutions.

In the deferred ruling on defendant's motion to suppress, the trial court found (1) that the return trip from Davenport was a critical stage in the proceedings and the defendant could have had the assistance of counsel before making statements if he had made such a request, (2) that there was an agreement between defense counsel and police officials to the effect that defendant was not to be questioned on the trip to Des Moines, but that he would talk to police in the presence of his attorney when they arrived, (3) that even if that agreement were violated, it would not require suppression here, but did serve the purpose of establishing defendant's state of mind in deciding whether to give some information to the officers before they reached Des Moines, and (4) that under all the evidence produced at the hearing the court found as a fact that the defendant did freely and voluntarily give such information to the officers.

Under this record we are also satisfied that defendant was adequately advised of his rights and understood them well, that evidence of the time element involved on the trip, the general circumstances of it, and the absence of any request or expressed

desire for the aid of counsel before or at the time of giving information, were sufficient to sustain a conclusion that defendant did waive his constitutional rights as alleged. It seems clear no statements or demonstrations which would connect defendant with this crime were made during the trip from Davenport to Grinnell, a distance of some 130 miles consuming two hours of time and that as they approached the Grinnell exit the defendant suddenly, spontaneously, voluntarily, and with no prompting, asked the officers if the child's shoes had been found, and then told where he put them when he stopped for gas on his way to Davenport. Even if defendant had chosen to remain silent at first, he was free to change his mind about talking to the officers and, as a matter of fact under the circumstances revealed, we think he did so as he approached Grinnell. We are satisfied that at this time he intelligently and informedly waived his right to the presence of his counsel, and we agree with the trial court that "These findings are made beyond a reasonable doubt."

In the trial proper, the defendant also made standing objections to all testimony of Captain Leaming related to his statements or actions on the return trip to Des Moines for the reason that defendant's statements were not voluntary and were made while he was in custody and when he was denied effective advice of counsel. They were generally overruled.

It seems abundantly clear that in overruling defendant's motion to suppress and in overruling his objections during trial to the evidence obtained by or through conversations between the defendant and the officer on the return trip to Des Moines, the trial court considered the totality of the circumstances as demonstrating beyond reasonable doubt defendant's voluntary and intelligent waiver of his right to remain silent and to have the assistance of counsel at that time. Thus, it appears the court followed the approved test for determining compliance with the Miranda mandates and committed no error in its rulings on admissibility.

III. A careful review of the record does not indicate there was any evidence compelling a conclusion as a matter of law that defendant's statements, revelations, or demonstrations were inadmissible at his trial.

It is undisputed that defendant was duly advised of his constitutional rights by the officers who had him in custody, i.e., Lieutenant Ackerman of the Davenport police department, Judge Metcalf, and Captain Leaming of the Des Moines police department, the latter just before they started the trip to Des Moines about 2 P.M. on December 26, 1968. It is undisputed that defendant consulted his attorney McKnight by telephone before he turned himself in and later at the Davenport police station before returning to Des Moines, and twice with an Attorney Kelly during his brief stay in Davenport. No further counsel assistance was requested.

It is also undisputed that defendant made no statements or revelations to the officers prior to their approach to the Grinnell exit of the freeway about 130 miles from Davenport, and that shortly after leaving Davenport Captain Leaming told defendant Williams that he did not want him to answer but he wanted him to think when they were driving down the road. He asked Williams to observe the weather. It was then raining, sleeting and freezing, and visibility was very poor. He told Williams they were predicting snow that night and said, "I think that we're going to be going right past where the body is, and if we should stop and find out where it is on the way in, her parents are going to be able to have a good Christian burial for their little daughter. If we don't and it does snow and if you're the only person that knows where this is and if you have only been there once, it's very possible that with snow on the ground you might not be able to find it." It also appears Williams had been told by his attorney something to the effect that he would have to tell the officers where the body was.

It is undisputed that no threats of any nature were made to Williams, that both counsel consulted by Williams prior to the trip told him not to talk until in McKnight's presence in Des Moines, and that there was no counsel available in the automobile on the return trip to Des Moines.

It is also undisputed that Williams was an escapee from a mental institute in Missouri, but his conduct and associations for several months had not indicated anything but normal behavior, and that the court ordered an examination at an Iowa Mental Health Institute, which did not find him incompetent or insane at this time.

The principal dispute is whether Officer Leaming attempted to interrogate Williams in the automobile during the trip to Des Moines. Williams said Leaming questioned him periodically concerning where the body was, not in rapid succession but every few miles. He recalled specifically a statement by Captain Leaming while they were drinking coffee at the Grinnel service station

that "You might as well tell us where the body is, we have an idea it's near Mitchellville, and when we get back to Des Moines, your attorney and you will accompany us back here and show us where the body is", a suggestion which conformed with the information already given him by his attorney. He also said Captain Leaming told him his attorney McKnight was ill with a heart ailment and it would be bad to make him go out at night to hunt for the body. On the other hand, Captain Leaming and Officer Nelson denied any interrogation of Williams and said the conversation, except for Leaming's first statement, did not relate to the crime charged but related to religion and what people thought of Williams in Des Moines. Captain Leaming further denied any promise to Williams or his attorneys that he would not attempt to question Williams on the trip or that he made any reference to McKnight's health at that time.

There is also a dispute as to whether this officer had an agreement with Attorney McKnight that there would be no interrogation of Williams until they arrived in Des Moines when all questions would be answered, and that they were to come straight back to Des Moines. Captain Leaming denied such an agreement, but there was testimony from other officers and the defendant which would support a finding that was counsel's understanding of the agreement.

On the other hand, Captain Leaming testified that as their automobile approached the Grinnell interchange Williams said to him, "Did you ever find her shoes?" and when Leaming said he didn't know but understood some things had been found at the rest area west of Grinnell, Williams replied, "No, I didn't put them with the rest of the clothing" and indicated with a nod of his head northward toward a Skelly station saying, "I put the shoes right up there, that filling station * * * I bought $2.00 worth of gas" and "I went around behind the building and dropped the shoes into an empty cardboard box." He further described the shoes or boots made of brown leather. A search for them did not reveal the shoes, but the station attendant recognized Williams as the party that stopped there on Christmas eve. Captain Leaming further testified that Williams told of leaving some clothes and a blanket at the rest area west of Grinnell and that when they approached the Mitchellville turn-off, he said, "I am going to show you where the body is" and proceeded to do so, although he missed the correct back road the first try. Officer Nelson corroborated this testimony, and other officers in contact with Captain Leaming aided in the search and recovery of the body.

[11] Whether the officers questioned Williams on the trip to Des Moines and whether they had agreed to come straight back to Des Moines with the defendant without any stops, were questions of fact, and in this so-called swearing contest the fact finder must resolve the questions. We find there is substantial evidence to support the trial court's finding of fact, and as to the jury's determination of which version was correct there can be no doubt. It is only in an extreme case, where the findings are without substantial support or the record is clearly against the weight of the evidence, that we will interfere with the fact-finding of the court or jury. State v. Everett, Iowa, 157 N. W. 2d 144 (1968); State v. Hardesty, 261 Iowa 382, 394, 153 N. W. 2d 464, 472 (1967); Greenwald v. Wisconsin, supra, 390 U. S. 519, 88 S. Ct. 1152, 20 L. Ed. 2d 77. Therefore, unless the trial court erred by failure to consider all necessary circumstances to resolve the questions of waiver, the judgment rendered herein must be affirmed. We find no such failure evident in these proceedings.

IV. The circumstances to be considered in determining waiver are many and varied depending upon each particular case. In State v. McClelland, supra, 164 N. W. 2d 189, we reviewed the evidence revealing the totality of circumstances and declared, despite the fact that the testimony did not show an express waiver of appellant's right to remain silent and to the assistance of counsel, the attendant circumstances clearly demonstrated the wholly voluntary nature of defendant's incriminating statement, and that they were admissible in evidence. We reaffirmed our position in this regard in State v. McPherson, Iowa, 171 N. W. 2d 870, and upheld the conviction because the proof of compliance with the federal Miranda mandates was sufficient to justify the ruling. Also see State v. Davis, 261 Iowa 1351, 157 N. W. 2d 907.

In State v. Blanchey, 454 P. 2d 841 (Wash. 1969), a case quite similar to the case at bar, the court considered the argument that incriminating statements made by defendant while flying back to Seattle under police escort were inadmissible, even though he had been given the Miranda warnings, because his right to the assistance of counsel at all times could not be met in the flight across the country. It rejected the contention and held, after defendant hd [sic] been duly warned, the attendant facts demonstrated that the defendant's statements were made of his free will and while he was aware of his rights including the right to assistance of counsel before making a statement, that he request-

ed no assistance of counsel, voluntarily gave the statements, and thus had no cause for complaint. Also see People v. Robles, 27 N. Y. 2d 155, 314 N. Y. S. 2d 793, 263 N. E. 2d 304.

[12, 13] Without an unnecessary review here of all the attendant facts in the case at bar, we are satisfied there is substantial evidential support for the finding that the defendant was given due and timely warnings under Miranda, that he understood them and had legal advice as to his right to remain silent and right to assistance of counsel before making any statement to the authorities, that he was not coerced or intimidated by the officers, and his statements were not secured by trickery or fraud. It seems clear, after considering the statement of Captain Leaming about the difficulty in finding the body after a snowfall and the statement of his own attorney that he would have to show where she was, the decision to reveal her whereabouts during the trip was made by his own free will. This, we hold, he could do despite the instructions of his attorneys and even their understanding with the officers that no such information would be obtained during the trip. What really caused his decision to speak out, only he knows, but we are satisfied there were sufficient proper reminders to justify the decision, and that it could not be said as a matter of law that Captain Leaming's suggestion was so improper as to make the admissions inadmissible. Books may be written on what is or is not proper police procedure in this regard, but we hold here it was not cause to reject the evidence adduced on this trip.

[14, 15] Although there are some jurisdictions that seem to hold there could be no waiver of one's rights except in the presence of his attorney, we do not subscribe to that view. See United States ex rel. Magoon v. Reincke, D. C., 304 F. Supp. 1014. We hold that, without a clear showing of mental incapacity of weakness, *the will of the accused* when intelligently and voluntarily exercised is paramount.

It is true, the reporter in 164 N. W. 2d 330 in headnote 12 concludes a "Miranda waiver taken in absence of defendant's attorney and without his permission was ineffective" and from this appellant contends we in State v. Hancock, supra, adopted the rule that no waiver could be made by an accused without his lawyer's consent. This is not true, and a careful reading of Hancock will reveal we dealt there with a limited stipulation for a specific purpose, that an attempt to introduce evidence of admissions beyond the polygraph test violated the agreement and was not waived by the accused. It is not authority for the proposition that waiver in this jurisdiction is dependent upon the presence of counsel at the time.

V. Appellant's contention that the protection furnished by the Sixth Amendment covers also any testimony offered by the State which was obtained by, through, or under the officers to whom the demonstrations, statements and confessions, were made, would appear to have merit, but in view of our rejection of his claim regarding the information given Captain Leaming, we need not consider further this complaint. If he waived as to the officers in the car, he also waived as to those who obtained information through them.

VI. Having carefully reviewed all the authorities cited by appellant and the State and many we have found which deal with waiver of constitutional rights as raised herein since Escobedo and Miranda, we must conclude that the trial court did not err in overruling defendant's motion to suppress and in its rulings on objections to evidence of statements, demonstrations, and admissions against interest due to waiver. Further complaint as to the court's instructions in appellant's motion for a new trial have been considered and are deemed without merit. There being no error, the conviction and judgment must be affirmed.

Affirmed.

MOORE, C. J., and LeGRAND, REES and UHLENHOPP, JJ., concur.

STUART, RAWLINGS, MASON and BECKER, JJ., dissent.

STUART, Justice (dissenting).

After more "soul searching" than should be necessary in an appellate decision, I reluctantly dissent from the majority opinion. This conclusion was made doubly difficult because the evidence so clearly connects defendant with this most reprehensible crime and because I personally believe there is nothing morally or legally wrong in permitting police officers to use psychology to secure incriminating statements from a defendant without counsel.

Since Miranda v. Arizona (1966), 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, however, the United States Supreme Court has held otherwise and I cannot escape the conclusion that when the totality of the circumstances test is applied to this evidence, accepting the officer's version of the trip from Davenport, the spirit, if not the letter of Miranda and subsequent decisions has been violated here. I do not believe the state sustained the bur-

den of showing defendant knowingly and intelligently waived his privilege against self incrimination and his right to have counsel present.

I doubt if the majority would have reached this result if defendant's crime had been less reprehensible. There is a natural tendency to make a tenuous finding of fact to avoid the application of a rule of law in a hard case. It seems to me the rule of law is unsound and that in the long run justice would best be served by applying it in accordance with its spirit and exposing the perverse result of its application.

I accept the statement of the law as set out in division I of the majority opinion, but cannot agree the evidence shows a knowing and intelligent waiver of the constitutional rights referred to therein.

Let us examine the circumstances under which defendant's incriminating statements were made. Defendant, an escapee from a mental institution with a deeply religious nature, called his attorney from Davenport. On advice of counsel he agreed to surrender himself to the Davenport police. Counsel advised the Des Moines police of these arrangements. After defendant turned himself in he talked to Mr. McKnight who advised defendant not to talk until he had talked with him. The officer heard that admonishment. The trial court found an agreement was made between defense counsel and police officials that defendant was not to be questioned on the return trip to Des Moines. Defendant was also advised by Mr. Kelly, a Davenport attorney, not to talk until he arrived in Des Moines. Mr. Kelly was denied permission to ride to Des Moines in the police car with defendant.

Captain Leaming, of the Des Moines city police, picked defendant up in Davenport. He testified that after he gave defendant the Miranda warnings, he reminded him he was represented by counsel and "that I wanted him to remember this because we would be visiting between here and Des Moines." He also stated defendant told him several times during the trip: "When I get to Des Moines and see Mr. McKnight I am going to tell you the whole story."

He also testified: "I did not question Mr. Williams on the ride to Des Moines; • • • that I had considerable conversation with Mr. Williams as to religion and what the people thought of him in Des Moines. • • •

"Well, Mr. Williams was very talkative, and he was asking me who we had talked to that were friends of his, if we talked to the Reverend from the church, if we talked to Mr. John Searcy, if we had checked for fingerprints in his room at the YMCA, and we discussed religion. We discussed intelligence of other people. We discussed police procedures, organizing youth groups, singing, playing a piano, playing an organ, and this sort of thing.

"Eventually, as we were traveling along there, I said to Mr. Williams that, 'I want to give you something to think about while we're traveling down the road.' I said, 'Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.'

"At that point Mr. Williams asked me why I should feel that we would be going right by it. I told him that I knew it was somewhere in the Mitchellville area and I didn't know exactly where, but I did know that it was somewhere in the Mitchellville area, and I felt that we should stop and look.

"I stated further, 'I do not want you to answer me, I don't want to discuss it any further. Just think about it as we're riding down the road.' • • •

"Well, we had further discussions about people and religion and intelligence and friends of his, and what people's opinion was of him and so forth. And, oh, some distance still east of the Mitchellville turn-off he said, 'I am going to show you where the body is.' He said, 'How did you know that it was by Mitchellville?' I told him that this was just part of our procedure, that this was our job to find out such things and I just knew that it was in that area. • • •

"Q. Now let me ask you this: When you said to him, you say you said to him it's snowing out here, bad weather, isn't that what you said to him? A. Yes, sir.

"Q. He didn't ask you that, did he? A. No.

"Q. Didn't you say that to him to induce him to show you where the body was? A. I was hoping he would.

"Q. You was hoping he would? A. Yes, sir.

"Q. So you wanted to make it appear to him that it might be harder or impossible to get out there the next day, you told him there was going to come a big snow, didn't you? A. No, I didn't tell him there was going to come a big snow. I asked him to observe the weather, observe the visibility, observe it sleeting and it raining and they're predicting snow for tonight.

"Q. And that was for the purpose of inducing him to talk, wasn't it? A. Telling the truth.

"Q. Well, I said, wasn't that for the purpose of getting Mr. Williams to talk? A. Well, I was hoping he would tell me where the body was, Mr. McKnight, absolutely. • • •

"Q. In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren't you? A. I was sure hoping to find out where that little girl was, yes, sir. • • •

"Q. Well, I'll put it this way: You was hoping to get all the information you could before Williams got back to McKnight, weren't you? A. Yes, sir."

It seems to me the only reasonable conclusion is that Captain Leaming embarked on a psychological campaign to obtain as much information from this mentally weak defendant as possible before letting him talk to his counsel. The fact that he was able to get the information by implanting ideas in defendant's mind without direct questioning is unimportant. If it were not for the agreement made with defendant's counsel, I personally would have no objection to this technique. However, I believe the law to be otherwise. There was no claim of verbal waiver of counsel. I do not think it was shown by the totality of the circumstances.

The aspect of the case which gives me the most concern was the obvious effort of the police officers to evade the good faith attempt of defendant's counsel to cooperate with the police department. While I can understand and sympathize with Captain Leaming's desire to recover the little girl's body as soon as possible, actions like those taken here can only cause defense counsel to lose confidence in the trustworthiness of police officers and discourage reasonable and sound approaches to criminal practice.

In my opinion the majority position in State v. Hancock (1969, Iowa), 164 N. W. 2d 330, 337, has more application to this case than the majority is willing to concede. There defendant's counsel agreed to a polygraph test and its admissibility into evidence. Defendant signed a waiver of her constitutional rights in the presence of the operator. After the test was completed defendant under the urging of the operator made certain admissions. A majority of the court in a brief concurring opinion held the state overreached defendant in offering the testimony as to admissions made after the test. The Miranda waiver was not proper because it was taken in the absence of defendant's attorney after a limited stipulation for a different specific purpose.

I would not favor a rule which would make it impossible for a defendant to waive his constitutional rights in counsel's absence, but when counsel and police have agreed defendant is not to be questioned until counsel is present and defendant has been advised not to talk and repeatedly has stated he will tell the whole story after he talks with counsel, the state should be required to make a stronger showing of intentional voluntary waiver than was made here.

I would agree with the statement in State v. Johns (1970), 185 Neb. 590, 177 N. W. 2d 580, 584-585:

"We hold that where the police or prosecutors know that a defendant, formally charged with a felony, is represented by counsel who has requested that no statements be taken from the defendant; and where the defendant, after being advised of his Miranda rights, has unequivocally asked for his attorney; statements deliberately elicited from the defendant by custodial interrogation designed to produce incriminating statements, and undertaken before the defendant has been given an opportunity to consult with his lawyer, are inadmissible, in the absence of an effective waiver.

"Where both the defendant and his counsel have previously attempted to invoke the defendants' constitutional right to counsel; then at the very least, a 'heavy burden' rests on the state to demonstrate that the defendant knowingly and intelligently waived his right to counsel. On the facts in this case, that burden was not met."

I believe this case must be reversed under the law as it now stands in the decisions of the United States Supreme Court.

RAWLINGS, Justice (dissenting).

In my opinion the facts set forth in Justice Stuart's dissent lead unalterably to the conclusion he reaches.

The statements made to defendant on the trip from Davenport to Des Moines were nothing less than a species of subtle but effective persuasion.

Whether these statements by Officer Leaming be classified as declaratory or interrogatory in form, they were designed to elicit a statement or confession by defendant.

The inculpatory statements made by defendant as a result thereof should have been excluded.

In support hereof see Blackburn v. Alabama, 361 U. S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242, and cases cited.

MASON AND BECKER, JJ., join in this dissent.

On October 12, 1972, the following Petition for Writ of Habeas Corpus was filed in the United States District Court, Southern District of Iowa:

Case No. 72-257-2

ROBERT ANTHONY WILLIAMS

a/k/a ANTHONY ERTHEL WILLIAMS
Number 103263,

Petitioner,

vs.

LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PERSONS IN STATE CUSTODY

---

1. Place of detention Iowa State Penitentiary, Fort Madison, Iowa

2. Name and location of court which imposed sentence Polk County District Court, Des Moines, Iowa

* * *

4. The date upon which sentence was imposed and the terms of the sentence:

(a) May 14, 1969. Imprisoned for life at hard labor in the Iowa State Penitentiary at Fort Madison, Iowa

* * *

12. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Evidence was used against me in my trial that was obtained in violation of the *Fifth Amendment* to the United States Constitution in that such evidence was obtained from me after I had invoked my privilege under the *Fifth Amendment* to remain silent.

(b) I was denied the assistance of counsel during the interrogation period and thus the evidence used against me at trial obtained during this period was in violation of my *Sixth Amendment* right to the assistance of counsel.

13. State concisely and in the same order the facts which support each of the grounds set out in (12):

(a) (1) The trial court found as a fact that my attorney and the Des Moines Police Department had entered into an agreement whereby the police agreed that there would be no questioning until I was returned to Des Moines from Davenport and was in the presence of my attorney.

(a) (2) I informed Detective Leoming [sic] of the Des Moines Police Department, who was returning me to Des Moines, that I would not talk until I was in the presence of my lawyer and yet he continued conversing with me.

(a) (3) Detective Leoming [sic] testified that he was hoping to get all the information he could out of me before I got back to my lawyer.

(b) I did not waive my right to have counsel present during the trip between Davenport and Des Moines, nor was I afforded the opportunity to have counsel present.

* * *

20. Do you make any complaint or claim that any admission statement or confession given by you and used against you at any stage of any proceeding leading to your commitment, was involuntarily made or made as the result of threats, promises, or coercion?

Yes

If your answer is yes, state the substance of such claim.

Admissions made by me as to the whereabouts of the body of Pamela Powers and certain articles of her clothing were made at a time when I was without the assistance of counsel and at a time when I had expressed my desire to remain silent.

* * *

22. Do you make any claim or complaint that any physical evidence used against you at any stage of any proceeding resulting in your commitment was illegally obtained, the result of an illegal search or seizure, or that the State knowingly used perjured testimony or that the State did suppress evidence tending to prove you innocent?

Yes

If your answer is yes, state the nature of such claim.

The location of the body of Pamela Powers and related facts were obtained from me at a time when I was without the assistance of counsel and at a time when I had expressed a desire to remain silent.

* * *

I understand that a false statement or answer to any of the questions contained in this pleading will subject me to penalties for perjury.

/s/ Robert Anthony Williams
ROBERT ANTHONY WILLIAMS
A/K/A ANTHONY ERTHELL WILLIAMS

Signature of Petitioner

On the 28th day of March, 1974, the MEMORANDUM AND ORDER of the United States District Court, Southern District of Iowa was filed and is set out at Appendix F, Supplemental Appendix, Petition for Writ of Certiorari.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NUMBER 72-257-2

NOTICE OF APPEAL

ROBERT ANTHONY WILLIAMS,
A/K/A ANTHONY ERTHELL WILLIAMS

Petitioner,

vs.

LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,

Respondent.

Notice is hereby given that respondent Lou V. Brewer, Warden of the Iowa State Penitentiary at Fort Madison, Iowa, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the Order sustaining petitioner's writ of habeas corpus entered in this action on the 28th day of March, 1974.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

/s/ Richard N. Winders
RICHARD N. WINDERS
Assistant Attorney General
State House
Des Moines, Iowa

Attorneys for Respondent.

On the 31st day of December, 1974, the OPINION AND JUDGMENT of the United States Court of Appeals for the Eighth Circuit was filed and is set out as Appendix A, Petition for Writ of Certiorari.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1300

CIVIL

ROBER ANTHONY WILLIAMS, a/k/a
ANTHONY ERTHEL WILLIAMS,

Appellee,

vs.

LOU V. BREWER, WARDEN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA,
CENTRAL DIVISION
THE HONORABLE WILLIAM C. HANSON
CHIEF JUDGE PRESIDING

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

COMES NOW the Appellant, Lou V. Brewer, Warden, pursuant to Rule 40 of the Federal Rules of Appellate Procedure and petitions for rehearing of this case and suggests to the Court pursuant to Rule 35 of said Rules that said rehearing be ordered en banc and states to the Court in support of said Petition and Suggestion as follows:

1. That on December 31, 1974, a Three Judge Panel of this Court composed of Senior Circuit Judge Vogel and Circuit Judges Ross and Webster filed its Memorandum Decision affirming the United States District Court for the Southern District of Iowa, The Honorable William C. Hanson, Chief Judge, which sustained Petition for Writ of Habeas Corpus on grounds that incriminating statements were obtained in violation of Petitioner's Fifth and Sixth Amendment rights, Judge Webster dissenting.

2. That it appears the Court has misapprehended the thrust of this Court's decision in *Stidham v. Swenson*, 16 Cr. L. 2261 (8th Cir. 11/26/74) in its application of 28 U. S. C. Section 2254 (d).

3. That it appears to counsel that while this Court has correctly stated the rule for determining whether an individual has waived his constitutional rights, the Court has failed to recognize or overlooked relevant record facts that clearly establish more than sufficient evidence of waiver of constitutional rights; thus it appears this Court has incorrectly interpreted or misapplied the prosecution's burden of proof of waiver under the rule of *Miranda v. Arizona*, 384 U. S. 436 (1966), as enunciated by this Court in *Hughes v. Swenson*, 452 F. 2d 866 (8th Cir. 1971).

4. That it appears to counsel that the facts relied upon by this Court to decide the issue of waiver are, in the main, irrelevant and immaterial to that issue.

5. That consideration of this Petition for Rehearing by the full Court is necessary to secure and maintain uniformity of this Court's decisions due to the inconsistency of the Court's decision in this case with this Court's decisions in *Stidham v. Swenson*, supra, and *Hughes v. Swenson*, supra.

ARGUMENT

I

Statement of the Case

Appellee was convicted by jury verdict of the crime of Murder in violation of Section 690.2, 1966 Code of Iowa. On May 14, 1969, appellee was sentenced in the Polk County Iowa District Court to a term of life imprisonment in the Iowa State Penitentiary, Fort Madison, Iowa. On December 15, 1970, the Iowa Supreme Court affirmed appellee's conviction. On March 9, 1971, the Iowa Supreme Court denied appellee's application for rehearing.

On October 16, 1972, appellee filed a Petition for Writ of Habeas Corpus in the United States District Court of Iowa, alleging his constitutional rights guaranteed by the 5th, 6th and 14th Amendments of the United States Constitution had been violated. Subsequent to an Order to Show Cause and Return, the Court, Honorable William C. Hanson, entered a Memorandum and Order sustaining the Petition for Writ of Habeas Corpus (Order of March 28, 1974). On April 11, 1974, appellant filed Notice of Appeal to the United States Court of Appeals for the Eighth Circuit. After submission of briefs and oral argument on the matter, this Court has affirmed by memorandum opinion filed December 31, 1974, with one Judge of the panel dissenting.

II

Statement of the Facts

On December 24, 1968, the Powers family attended a wrestling tournament in the YMCA building in Des Moines, Iowa ([1]T.T. p. 4). When Pamela Powers, age 10, failed to return from a visit to the washroom a search was started for her, but she could not be found in the building, and the police were called (T.T. pp. 7-8). About that time or between 1:00 and 1:30 P.M., the appellee, Williams, who had a room on the seventh floor of the building, was seen in the lobby coming from the elevator carrying some clothing and a large bundle wrapped in a blanket similar to those provided in the YMCA rooms (T.T. pp. 17-20). He spoke to several persons on the way out, explaining to one party that he was carrying a mannequin (T.T. p. 89). He requested the aid of a 14-year-old boy to open first the Locust Street door and then the door to his Buick automobile parked on the south side of the street facing east. This boy testified that when the appellee Williams placed the bundle in the passenger seat he "saw two legs in it and they were skinny and white" (T.T. pp. 60-63). Efforts by YMCA personnel to view the object were thwarted by appellee as he closed and locked his car doors and drove away. They also called for the police (T. T. p. 91).

On December 25, 1968, appellee's car was found in Davenport, Iowa approximately 160 miles east of Des Moines, and a search was instituted for him. At about this time, a warrant for appellee's arrest on a charge of child-stealing was issued and filed in Polk County ([2]R. pp. 16, 108).

1 Trial Transcript of Evidence, hereinafter referred to as "T. T.".

On the morning of December 26, 1968, appellee called his Des Moines attorney, Mr. Henry McKnight, from Rock Island, Illinois. Mr. McKnight advised appellee to surrender himself to the Davenport police (R. p. 67). At approximately 8:40 A.M. on December 26, 1968, appellee did surrender himself to the Davenport police. Lt. John Ackerman of the Davenport police advised appellee of his constitutional rights under *Miranda* (R. p. 16).

Appellee's counsel, Mr. McKnight, came to his office at about 9:00 A.M., December 26, 1968. At that time, Mr. McKnight received a call from the appellee in Davenport, Iowa (T. T. pp. 355, 356). Mr. McKnight told appellee that he would be picked up in Davenport, that he would not be mistreated or grilled, and that they would talk it over in Des Moines. McKnight's portion of the conversation was carried on in the presence of Des Moines Chief of Police Wendell Nichols and Detective Cleatus Leaming.

Mr. McKnight further advised appellee that the appellee would have to tell the officers the location of the body. Mr. McKnight told the appellee that when he got back to Des Moines the appellee could tell him the story and then he would tell the police the whole story (T. T. p. 265).

The appellee was further instructed not to make any statements until returning to Des Moines and his attorney.

As a result of these conversations, it was agreed that Detective Leaming would go to Davenport to pick up appellee, without Mr. McKnight and bring him back to Des Moines. On December 26, 1968, Leaming, accompanied by Detective Arthur Nelson, drove from Des Moines to Davenport to pick up appellee.

At 11:00 A.M., on the same day, appellee was arraigned before state court Judge Metcalf in Davenport as a fugitive to be held on the Polk County warrant and notified of the charge of child-stealing against him. Judge Metcalf again advised the appellee of his rights (T. T. p. 204).

2 Record on appeal to Supreme Court of Iowa, hereinafter referred to as "R".

The appellee was then granted a conference with an attorney, Mr. Thomas M. Kelly, Jr. After the conference, Mr. Kelly advised the Davenport Police that appellee wished to remain silent and await the arrival of the Des Moines Police on advice of his Des Moines counsel (T. T. pp. 205, 206).

After lunch, appellee, Mr. Kelly, Leaming, Nelson and Ackerman assembled in the latter's office where again appellee was advised of his rights (T. T. pp. 206-207). Appellee was then afforded two separate conferences with Mr. Kelly taking the total time of about one hour (T. T. pp. 216, 217). Captain Leaming, Detective Nelson and appellee then left for Des Moines at about 2:00 P.M.

With Nelson driving and Leaming and appellee in the back seat, the trio proceeded westbound on I-80 to Des Moines. Shortly out of Davenport, appellee initiated a conversation with Leaming. The talk included general discussion concerning religion, appellee's reputation, and various other topics including appellee's friends, his Reverend, a Mr. Searcy, whether the police had checked for fingerprints in appellee's room, the intelligence of other people, police procedures, organizing youth groups, singing, playing a piano, playing an organ, "and this sort of thing" (T. T. p. 224).

Appellee asked Leaming whether he hated him or wished to kill him; to which Leaming responded: "I myself had religious training and background as a child and that I would probably come more near praying for him than I would to abuse him or strike him" (T. T. p. 222). All of this conversation had been initiated by appellee or was in direct response to appellee's questions.

Captain Leaming then told appellee that he wanted appellee to think about something while traveling. The hazardous weather conditions and the snow might render the finding of deceased's body difficult. You are the only person that knows where the body is. She should be given a Christian burial and that they should stop and locate the body on the way rather than waiting until morning (T. T. pp. 224, 225). Leaming then stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." This subject was not mentioned again until, while approaching the Grinnell exit on Interstate 80, the appellee asked "Did you find her shoes?" Leaming replied that he did not know and appellee then directed the officers to a Skelly Station where he had disposed of the shoes (T. T. pp. 225-226). They searched but were unable to locate the shoes. Upon returning to the Interstate appellee asked Leaming

if he had found the blanket (T. T. pp. 229, 230). Whereupon appellee told the officers where he had placed the blanket, but the B. C. I. agent told him that the blanket had been found.

They then returned to Interstate 80 and proceeded west to Des Moines. After further discussion about "people", etc., and some distance east of Mitchellville, Iowa, the appellee said, "I am going to show you where the body is" (T. T. pp. 231, 232). He then proceeded to direct the officers to the location of the body (T. T. pp. 235-242). The body was found and the identification bureau of the Des Moines Police Department then took over at the scene.

III

Discussion

This Petition for Rehearing En Banc is concerned with: (1) a waiver of an individual's 5th Amendment right to remain silent and 6th Amendment right to assistance of counsel while in police custody; and, (2) the application of 28 U. S. C. 2254 (d). This Court, in its opinion of December 31, 1974, Judge Webster dissenting, decided that appellee did not waive these constitutional rights and that his rights had been violated. The opinion of this Court appears to conflict in fact and law with prior decisions of this Court and other federal authorities on both the questions of waiver and the application of 28 U. S. C. 2254 (d).

The majority found that the record indicates with regard to the facts challenged here that the state court did not resolve the merits of the factual disputes. The majority further states that the record of the state proceedings reveals certain discrepancies between the testimony of Mr. Kelly and Detective Leaming and certain ambiguities in some of the testimony upon which the District Court relied in making its finding. Thus, the presumption of correctness to be given findings of the state court created by 28 U. S. C. Section 2254 (d) is destroyed.

Since the discrepancies and ambiguities of record facts go directly to the ultimate issues in this case, it is imperative that these factual ambiguities be finally resolved before the ultimate issues are determined. This Court, in *Stidham v. Swenson*, 16 Cr. L. 2261 (8th Cir. 11/26/74) seems to have spoken to that issue when they remanded to the district court for an evidentiary hearing to adequately develop material facts on crucial evidentiary points.

Surely if the facts enunciated in *Stidham* were deserving of further inquiry, the factual discrepancies and ambiguities of the instant case merit resolution. As the Honorable Judge Ross stated at oral argument, this case is important to historical precedent. To determine such an important case without the full benefit of completely developed facts would seem to fly in the face of the Court's reasoning in *Stidham*.

It is our contention that if factual discrepancies and ambiguities exist that are crucial to the determination of the ultimate issues more is required than a study of the bare record to determine the factual dispute. As suggested by the Honorable Judge Webster in dissent, an independent evidentiary hearing should be held before issues of credibility of witnesses are determined by a federal judge. Since the issues of waiver and voluntariness rise or fall on disputed facts which the triers of fact found adversely to Williams, it appears mandatory that an evidentiary hearing be held.

An individual may waive constitutionally guaranteed rights. *Miranda v. Arizona*, 384 U. S. 436 (1966). The test of waiver is clear—whether an individual, with knowledge of his rights, intelligently and knowingly declines to exercise them. *Hughes v. Swenson*, 452 F. 2d 866 (8th Cir. 1971). The test has also been defined as an intentional relinquishment or abandonment of a known right. *Johnson v. Zerbst*, 304 U. S. 458 (1938). The burden of proof is upon the prosecution to show by recorded facts that an individual did intentionally, knowingly, and voluntarily choose not to exercise his right to remain silent or to an attorney. *Miranda*, supra. The burden is a heavy one especially where incriminating statements are obtained by the police. *Miranda*, supra. In the absence of an express waiver, the totality of surrounding circumstances must be assessed to determine whether an individual intelligently and knowingly elected to waive his rights.

In this Court's decision of *Hughes v. Swenson*, supra, where an accused was found to have been adequately warned of his rights under *Miranda* and asserted that he understood his rights, this Court decided that appellant had waived his constitutional right to counsel. The rule enunciated by this Court is as follows:

> "Having concluded that appellant was not only warned as required by *Miranda* but that he also asserted that he understood his rights, the legal question remains whether such an assertion constitutes a valid waiver of counsel.

* * *

> ". . . if the defendant is effectively advised of his rights and intelligently and understandingly declines to exercise them, the waiver is valid."

That appellee had been more than adequately warned of his *Miranda* rights appears conceded by the District Court and the majority of this Court and is clear under the record. Full *Miranda* warnings were given appellee on three separate occasions, the final warning by Captain Leaming immediately prior to departure for Des Moines. That appellee understood he had the right to an attorney cannot be denied under the record. As was present in *Hughes*, appellee here expressly acknowledged that he understood his rights and, in fact, exercised his right to counsel by retaining Attorney McKnight in Des Moines and Attorney Kelly in Davenport. Further, he conferred privately with Attorney Kelly twice in Davenport. That he understood his right to remain silent is equally supported by the facts. Aside from his express statement that he understood his rights, he was admonished by Attorney McKnight not to talk to the police and knew that Attorney Kelly had advised the police that Williams would remain silent on the trip to Des Moines.

Under the rule enunciated in *Hughes* above, the fact that the defendant is "effectively advised of his rights" is a relevant and significant factor in determining whether an accused waived his constitutional rights. The District Court and the majority in this Court concluded that no facts were established by the prosecution to support the conclusion that appellee had waived his rights.

It appears the Court overlooked the significant factors of adequate *Miranda* warnings and assertion by the accused of his understanding of said rights as mandated by *Hughes*.

That appellee thereafter "intelligently and understandingly" declined to exercise his rights is adequately supported by the record. It is suggested that the Court overlooked the following facts and thus narrowed the facts upon which they made their determination.

1. That Williams initiated conversations with Officer Leaming pertaining to the crime and freely conversed with Leaming on many topics.

2. The incriminating statements made by Williams concerning the shoes, blanket, and body were not made in response to any questions, but were spontaneous.

3. Williams had been advised by his attorney that he would have to divulge the location of the body.

4. After Leaming made the statement pertaining to the weather and the location of the body, he stated to Williams: "I do not want you to answer me. I don't want to discuss it any further."

These facts indicate clearly that the heavy burden upon the State to establish waiver was met.

The test of waiver is a subjective one. Only the accused can waive his rights, not his counsel. It appears that the Court relied on irrelevant facts that have no bearing upon whether Williams knowingly and intelligently declined to exercise his rights.

CONCLUSION

For all the above reasons, Appellant respectfully requests that this case be restored to the Court's calendar for reargument and resubmitted to the Court en banc.

RICHARD C. TURNER
Attorney General of Iowa

By /s/ Richard N. Winders
RICHARD N. WINDERS
Assistant Attorney General
State Capitol
Des Moines, Iowa 50319

Attorneys for Appellant.

(Certificate of Service omitted)

On the 30th day of January, 1975, the ORDER denying Petition for Rehearing En Banc and for Rehearing of the United States Court of Appeals for the Eighth Circuit was filed and is set out as Appendix C, Petition for Writ of Certiorari.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1300

CIVIL

ROBERT ANTHONY WILLIAMS, a/k/a
ANTHONY ERTHEL WILLIAMS,

Appellee,

vs.

LOU V. BREWER, WARDEN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA,
CENTRAL DIVISION
THE HONORABLE WILLIAM C. HANSON,
CHIEF JUDGE PRESIDING

APPLICATION FOR STAY OF MANDATE

COMES NOW the Appellant, Lou V. Brewer, pursuant to Rule 41 (b) of the Federal Rules of Appellate Procedure and makes application for a Stay of Mandate pending application to the Supreme Court for a writ of certiorari as follows:

1. That on December 31, 1974, a Three Judge Panel of this Court composed of Senior Circuit Judge Vogel and Circuit Judges Ross and Webster filed its Memorandum Decision affirming the United States District Court for the Southern District of Iowa, The Honorable William C. Hanson, Chief Judge, which sustained Petition for Writ of Habeas Corpus on grounds that incriminating statements were obtained in violation of Petitioner's Fifth, Sixth and Fourteenth Amendment rights, Judge Webster dissenting.

2. That on January 14, 1975, Appellant filed a Petition for

Rehearing and Suggestion for Rehearing en banc.

3. That if this Court denies Appellant's Petition for Rehearing and Suggestion for Rehearing en banc. Appellant will Petition for Writ of Certiorari to the United States Supreme Court.

4. That Appellant believes that important issues will be presented in said Petition for Writ of Certiorari and Appellant believes there is a reasonable chance that the writ of certiorari will be granted.

5. That the granting of a Stay of Mandate will be of no harm to appellee.

6. That in view of appellee's history of acts dangerous to society, his continued incarceration pending final resolution of this case is necessary to the welfare of society.

WHEREFORE, Appellant respectfully requests that the Stay of Mandate Pending Application to the Supreme Court for Writ of Certiorari be granted.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

By /s/ Richard N. Winders
RICHARD N. WINDERS
Assistant Attorney General

(Certificate of Service Omitted)

On the 6th day of February, 1975, the ORDER staying mandate of the United States Court of Appeals for the Eighth Circuit was filed and is set out as Appendix D, Petition for Writ of Certiorari.

The applicable statutes, Amendment 5, Constitution of the United States; Amendment 6, Constitution of the United States; Amendment 14, Constitution of the United States; Title 28, U. S. C. § 2254 (d), and Title 18, U. S. C. § 3501, Omnibus Crime Control and Safe Streets Act of 1968 are set out in Appendix E, Petition for Writ of Certiorari.

The following excerpts of testimony are taken from the transcript of the Preliminary Hearing held January 10, 1969, in the Municipal Court of City of Des Moines, Polk County, Iowa, before the Honorable Luther T. Glanton, Jr., Judge:

DETECTIVE CLEATUS M. LEAMING

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANSEN:

* * *

[Objection made during testimony of Detective Leaming].

Q. Now, shortly after you got on the freeway did Mr. Williams ask you anything?

Mr. McKnight: Just a moment. We are going to object to any conversation with Mr. Williams under the case of Esposito versus the State of Illinois for the reason this man was without counsel and we put the burden upon the State to show that anything Williams said was said within keeping of the Miranda case and the burden is upon them [P. T. p. 23].[1]

* * *

DISCUSSION IN CHAMBERS

* * *

Mr. Hansen: He was completely advised of his rights and he was allowed to talk to this Mr. Kelly.

Mr. McKnight: But he had an agreement with me.

Mr. Hansen: Who?

Mr. McKnight: The Detective Department.

---

1 The abbreviation P. T. shall stand for Transcript of the Preliminary Hearing held January 10, 1969.

Mr. Hansen: Leaming said he didn't have an agreement with you.

The Court: I'll tell you what I'm going to do. At the state of the record now the Court is not going to permit any testimony that came from this defendant at the state of the record now.

• • •

DIRECT EXAMINATION (Continued)

BY MR. HANSEN:

Q. Now, please answer this yes or no. On the way back from Des Moines did Mr. Williams ask you questions?

Mr. McKnight: Just a moment. That will be objected to, any conversation between he and this witness. The conversation is incompetent, irrelevant and immaterial under the Miranda decision.

The Court: You may answer that yes or no.

A. You said on the way back?

Mr. McKnight: Now just a moment.

Mr. Hansen: Reread the question.

(The last question was read back by the court reporter.)

A. Not from Des Moines, no.

Q. On the way back to Des Moines?

A. To Des Moines, yes.

Q. State whether or not you had any conversation with Mr. Williams on the way back to Des Moines.

Mr. McKnight: That will be objected to for all the reasons heretofore urged.

The Court: You may answer.

A. Yes.

Q. And as a result of those conversations did you make any stops?

Mr. McKnight: Just a moment. That is going to be objected to. Any information that he got as a result of this conversation is in violation of this fellow's constitutional rights.

The Court: For the purpose of this hearing, Mr. McKnight—I think in the trial of the case you'll have something there, but for the purpose of this hearing the Court will permit this officer to state what he did . . . [P. T. pp. 37-39].

On March 25, 1969, the following Motion to Suppress was filed in the District Court of the State of Iowa in and for Polk County:

MOTION TO SUPPRESS

COMES NOW the Defendant and moves the court to suppress the testimony of the following witnesses hereinafter set forth for the reason that their interrogation of the Defendant and the way the testimony was obtained amounted to a denial of assistance of counsel to the Defendant in violation of the Sixth Amendment to the Constitution of the United States as made obligatory upon the States by the Fourteenth Amendment to the United States Constitution and said testimony and said witnesses are set out as follows:

• • •

7. That the entire testimony of C. M. Leaming, except the first 12½ lines thereof as shown in the Minutes attached to the Indictment, be suppressed for the reason that C. M. Leaming obtained the information to give the testimony from an interrogation of the defendant in violation of his agreement with the Defendant's counsel, Henry T. McKnight, that he would go from Des Moines to Davenport and return the defendant to Des Moines and that no questioning of the Defendant would be made until the Defendant was returned to Des Moines where he had assistance of counsel and that said agreement was not kept and interrogation of the Defendant was made from the beginning of the trip from Davenport to Des Moines and it was a denial of the assistance of counsel to the Defendant in violation of the Sixth Amendment to the Constitution as made obligatory upon the states by the Fourteenth Amendment.

• • •

WHEREFORE, Defendant prays that the Motion to Suppress be sustained.

HENRY T. McKNIGHT

Attorney for the Defendant
506 East Walnut Street
Des Moines, Iowa 50309
243-5293

The following excerpts of testimony are taken from the transcript of the Suppression of Evidence Hearing held April 2, 1969, in Polk County District Court before the Honorable J. P. Denato, Judge.

The Court: The matter before the Court this morning is a motion to suppress evidence on the part of the Defendant.

Mr. McKnight, are you ready to proceed?

Mr. McKnight: Ready to proceed, Your Honor. I wanted to make this reservation to the Court: In order so the Court would understand, Mr. Kelly, attorney in Davenport, was supposed to be one of the witnesses. I had a phone call from him and he had drawn a jury in Davenport, and he said it would just be impossible for him to honor the subpoena, and I said I wouldn't press it, because he was trying a case and I guess that would let him out. But I still want to go on with what we've got and get it over with. All right, Your Honor?

The Court: Very good.

Mr. McKnight: Call Chief of Police Nichols. [S. T. p. 2][2]

• • •

Q. What is your business or occupation?

A. Chief of Police, Des Moines, Iowa. [S. T. p. 3].

• • •

2 The abbreviation S. T. shall stand for the transcript of the Suppression Hearing held April 2, 1969.

Q. Chief, I call your attention to the day after Christmas, which is December 26, 1968, and I'll ask you whether or not you saw me about five minutes to nine or nine, a. m., that morning?

A. I did.

Q. And when you saw me, I mean Henry T. McKnight?

A. Yes.

Q. Now were you or your department endeavoring at that time to apprehend Robert Anthony Williams?

A. Yes.

Q. Did you at that time know where Mr. Williams was?

A. I don't think we knew at that time for sure. We felt he was in—and maybe we got this from you, I don't know, but somewhere in the vicinity of Davenport. We found his car there.

Q. Yes. Do you recall whether or not on that morning that Henry T. McKnight came into the Detective Leaming's office and while he was there, a telephone call was made from Davenport?

A. Yes.

Q. Were you present?

A. Yes.

Q. Did also you hear Henry T. McKnight talk to Williams over the long distance phone call from Davenport?

A. I assume it was Williams. I had good reason to assume.

Q. You had good reason to believe. Were you all informed that Williams had surrendered?

A. Yes.

Q. Had I told you that prior thereto that I had asked him to surrender as a result of a long distance call he made to me?

A. Yes.

Q. And did I tell you that I thought he would?

A. Yes.

Q. Now while there, did you assign anybody to go to Davenport and pick up Mr. Williams?

A. Yes.

Q. Who did you assign?

A. Leaming was one of them. I think he picked the other man.

Q. I see. Was that Nelson?

A. I think so, yes.

Q. Now did you hear what I told Williams over the phone which you say you assume is Williams, in the presence of Leaming, relative to making any statement about this crime?

A. Well, as I recall it, Mr. McKnight, you stated to Mr. Williams that the officers would be nice to him, that they were nice people, that they weren't going to grill him or beat him around, and to come back to Des Moines with the officers and that we would talk it over in Des Moines.

Q. Did you hear me say to them, say to this party over the phone which you assumed to be Williams, that all the questioning and answers would be given when you get here?

A. Relative to that, yes.

Q. Was it your understanding when Mr. Leaming left that they were going straight to Davenport and bring this man straight back?

A. That's right.

Q. Chief, did that happen, did they come straight back?

A. Well, they came back to Des Moines. I understand they—In fact, they did made [sic] some stops.

Q. And you were there waiting for them to come back along with me, weren't you?

A. Yes. [S.T. pp. 3, 4, 5].

• • •

Q. Now were you advised, prior to the arrival of Mr. Leaming and the defendant, that the defendant had been carried to discover the body?

A. Yes.

Q. When did you get that information?

A. I made an inquiry a couple times through the radio, as much as I could. They couldn't receive us entirely on the radio, but we kept them fairly well pin pointed on the way back. We knew they had stopped twice on the way back, and then the last time they stopped we were in radio contact.

Q. You didn't reveal that to me, though, did you, as police work?

A. No. I don't think I kept it from you.

Q. I see. But obviously you didn't tell me, and I'm not saying that it was your obligation, but you didn't tell me, did you, that they had stopped?

A. Not that I recall. I don't know if I did or didn't.

Q. Now do you recall having talked with me and I said I bet you they're questioning this fellow Williams and going to stop on the way somewhere to try to discover the body; do you remember that?

A. I remember you were quite upset about it.

Q. And do you recall what you said?

A. Not exactly.

Q. Well, let me ask you this, do you remember?

A. No, not exactly.

Q. I'm going to give you and ask you if you remember saying this: I hope they don't because we agreed that we would come straight back?

A. I may have said that, I don't know. [S.T. pp. 6, 7].

• • •

Q. Who did you get your information from about the body?

A. Well, it was radioed to me, radioed to the station, I believe to Knox, Knox said that they had stopped to find the body or some such thing as this.

Q. Now, who would have radioed?

A. Probably Leaming.

Q. Who?

A. Leaming, probably.

Q. Do you know, Chief, who called the coroner?

A. I don't know. I would assume again this may have been Leaming. He was in charge of the scene.

Q. And then Dr. Luka wouldn't have been out there unless somebody called him and knew about the facts, right?

A. I'm sure of that.

Q. Now there was no conversation—Were you present actually when the defendant was brought into the police station?

A. Yes.

Q. Was there any information given to any of you by the defendant when he has assistance of counsel here in Des Moines?

A. No. [S. T. pp. 8, 9].

• • •

Q. So actually you all, you were unable, so far as locating the body, without the assistance of Williams?

A. That's right. [S. T. p. 9].

• • •

CROSS-EXAMINATION

BY MR. HANRAHAN:

Q. Chief Nichols, on December 26, 1968, did you have any agreement with Mr. McKnight that there would be no conversation between the defendant and your detectives on the way back from Davenport?

A. There was no specific agreement made as far as a hard and fast agreement, you will not ask him anything, he will not tell you anything, except Mr. McKnight, over the telephone to Mr. Williams, stated, "We will talk when you get here."

Q. Did you hear Mr. McKnight in that telephone conversation make a statement such as this: "You're going to have to tell the officers everything," or "You're going to have to tell the officers where she is," or something of that nature?

A. Something of that nature.

Mr. Hanrahan: I believe that's all, Chief.

REDIRECT EXAMINATION

BY MR. McKNIGHT:

Q. Anything I said about what I'd tell the officers, I did not say to him, "When you get here where I am."

A. Well, I don't know what we're trying to say except that I took what was being said over the telephone as more or less cooperative spirit as far as you were concerned as to what you were going to do with your client once he got here.

Q. And you also definitely understood that I had expected that there would be no statement made by him till he did get here in Des Moines?

A. I assume that when we were talking there at least that what you said over the telephone to this man and what you asked him to do, that that's exactly what he was going to do, and I also assumed that he had probably been fortified with some advice on the other end as to what to do when he got here. [S.T. pp. 10, 11].

• • •

JOHN D. ACKERMAN, SR.,

Called as a witness on behalf of the defendant, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. McKNIGHT:

• • •

Q. Where do you live, Mr. Ackerman?

A. Davenport, Iowa.

Q. What is your business or occupation?

A. Lieutenant of detectives, Davenport, Iowa, police department.

Q. Were you on duty on December 26, 1968?

A. Yes, sir, I was.

Q. Did you have an occasion to see Mr. Williams here?

A. Yes, sir, I did.

Q. Do you recall about the time of day you saw him on December 26th?

A. 8:40, I believe, if I'm correct. I didn't bring in my reports. I have them with me.

Q. Well, in that vicinity?

A. Yes, sir, 8:40 a.m.

Q. Do you recall what Williams said when he came in?

A. To me?

Q. Yes.

A. I was called by the desk sergeant, called out to the front desk, a man wanted to see detectives. I went out and introduced myself and asked the man who he was. He said, "I am Anthony Williams. I am the man the Des Moines police are looking for."

Q. Then what did you say?

A. We then asked him to come back to the detective bureau. We brought him back to my office where he was advised that a warrant was on file from Polk County, charging him with the crime of child stealing. He was placed under arrest at that time and advised of his constitutional rights.

Q. Then what did you do with him?

A. After we booked him in, he was placed in a cell. Of course then we notified Des Moines and—

Q. Did you make the call to Des Moines?

A. Yes, sir, I did.

Q. Do you know whether or not Williams was permitted to talk to Henry T. McKnight?

A. Yes, sir, he was. I was present in the office.

Q. When you called to Des Moines, did you make any statement relative to whether or not Williams would talk, what did you say about that?

A. If I remember right, I believe I said that he didn't wish to say anything because — until he talked to his attorney in Des Moines.

Q. Now did you also see any other attorney there in Des Moines who visited with the defendant?

A. You mean Des Moines, Mr. McKnight, or Davenport?

Q. In Davenport.

A. Later on. Later on.

Q. About what time of day was that?

A. That would have probably been about quarter to 11, somewhere in that area, when we took Williams in before the Judge.

Q. Was that an arraignment?

A. Arraignment as a fugitive to be held on the warrant, yes sir.

Q. And did the defendant talk to the Judge?

A. Yes, sir, he did. He requested a conference with the Judge and the Judge took him into his private chambers and talked to him.

Q. You wasn't in there?

A. No, sir, I was not.

Q. Now when the defendant came out of the conference with the Judge, do you recall what took place?

A. Well, went back into the court room and the Judge of course heard the evidence in reference to the warrant on file, and he ordered him held as a fugitive for Polk County authorities, and this is when — As we were leaving the court room, is when Williams spotted Mr. Kelly sitting in the court room.

Q. Is Mr. Kelly a colored lawyer?

A. A colored attorney in Davenport.

Q. Did the defendant say anything about he wanted to retain Mr. Kelly?

A. He said to me, "Is that man an attorney?" And I advised him yes, he was, and his name was Thomas Kelly. I asked him if he wanted to talk to him, he said yes, he would like to. I then turned to Mr. Kelly and asked him if he would follow us back to the detective bureau as this man would like to confer with him, which he did. They were allowed to use the detective bureau conference room and they spent some time together.

Q. Now do you recall after you made the call to Des Moines, did Detective Leaming show up there?

A. Yes, sir, about right shortly before noon, about ten minutes to 12.

Q. Now after you said Mr. Williams didn't want to talk till he got his lawyer in Des Moines, you all made no effort to question him?

A. No, sir.

Q. So he said nothing to you all?

A. Right. Right [S.T. pp. 12, 13, 14, 15].

• • •

Q. All right. Now when they left, Lieutenant, was it your understanding that Mr. Leaming was going to take the defendant straight to Des Moines to his lawyer?

A. Yes, sir, that was my understanding.

Q. Now there was only two officers, that was Leaming and someone else; is that right?

A. Yes, sir.

Q. And when they left, Mr. Kelly stayed there in Davenport?

A. Right.

Mr. McKnight: That is all.

CROSS-EXAMINATION

By MR. HANRAHAN:

Q. Lieutenant Ackerman, are you acquainted with this Thomas Kelly?

A. Yes, sir, I am.

Q. And is he a practicing attorney in Davenport, Iowa?

A. He is, yes, sir [S.T. pp. 16, 17].

• • •

Q. Now you stated Mr. Williams came into the station approximately 8:40?

A. Right.

Q. And he was taken before the Judge at 10:45, about two hours later?

A. Right.

Q. Where was he during those two hours?

A. In the cell block, in the police station.

Q. Was he by himself?

A. Yes, sir, he was by himself.

Q. Was there any questioning of him during this period?

A. No, sir [S. T. p. 19].

• • •

Q. Now was there a time after lunch prior to the officers leaving with Mr. Williams that Mr. Williams requested another conference with Mr. Kelly?

A. Yes. He had talked to him just very shortly before their meeting of Captain Leaming and Mr. Kelly and Mr. Williams, just a few minutes in the office before the other — Where Captain Leaming went in.

Q. When Mr. Kelly and Mr. Williams were alone?

A. Right [S. T. p. 20].

• • •

Q. Do you recall what the road conditions were on December 26?

A. Very bad.

Q. Was it raining?

A. Rain and sleeting and turned cold and windy, freezing. The roads were slick.

Mr. Hanrahan: That's all [S. T. p. 21].

REDIRECT EXAMINATION

By MR. McKNIGHT:

• • •

Q. Now did you hear Mr. Kelly make any statement to the defendant relative to what he was to do on the way or was he to remain silent till he got to Des Moines; did you hear him make any statement?

A. No, I didn't hear that, sir, no [S. T. p 22].

• • •

ANTHONY ERTHELL WILLIAMS,

Defendant, called as a witness in his own behalf, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

By MR. McKNIGHT:

• • •

Q. Now let me ask you this: On December the 26th, do you recall whether or not you called me?

A. Yes.

Q. Do you recall going in the city jail at Davenport?

A. Yes.

Q. Did you see Mr. Kelly?

A. Yes, I did.

Q. Did you retain him as a lawyer?

A. I did not retain him as a lawyer. I retained his presence only because he was the only Negro present.

Q. Now were you permitted to talk to me, Henry T. McKnight, from Davenport?

A. Yes.

Q. That was on long distance telephone call?

A. Right.

Q. Do you recall what I said relative to what you were to do when the officer picked you up?

A. Yes.

Q. What was the conversation?

A. To refuse to answer any questions until I came back to Des Moines, I was in your presence.

Q. Did Mr. Kelly, in the presence of you, say anything to Mr. Leaming about that before you left?

A. Did he say what now?

Q. Say anything to Mr. Leaming about your talking?

A. Yes, he did. He told them that I wouldn't answer any questions until I got back to Des Moines.

Q. Now what did Mr. Leaming say to that?

A. He didn't have any comment. In fact, he didn't care too much for Mr. Kelly's presence at all.

Q. Now when you all left for Davenport, what was the first thing Mr. Leaming said to you?

A. They were talking about the weather, conditions of the road and so on.

Q. Did Mr. Leaming question you in any form relative to the whereabouts of the body?

A. He questioned me periodically concerning where the body was, that he knew the girl was dead and he also mentioned that

they had some speculation that the body was near Mitchellville.

Q. Okay.

A. I mean, this wasn't in rapid succession. This was as we travelled a few miles at a time.

Q. Now did you all come straight back to Des Moines?

A. We did not.

Q. Now was there anything said about your lawyer's health in Des Moines?

A. Yes; that he had talked to you and — In fact, when he left you, you weren't feeling too well, that your heart was bothering you and that I was supposed to show them where the body was, and there would be a waste of time to go all the way to Des Moines to get you and come back, and that's what we would have to do, probably be on the road all hours of the night, and this would be bad for your health.

Q. Okay. Now did this continue until you showed them where you thought the body was?

A. Yes.

Q. Was it your understanding, when you left Davenport, that you would not be questioned until you got to Des Moines?

A. Definitely.

Q. Now these questions that were put to you out there in the car, it's obvious you had no assistance of a lawyer?

A. There was no attorney present.

Q. Do you recall approximately what time you got into Des Moines that night?

A. I was thinking it was close to 7 or 7:30.

Q. Was Lieutenant Ackerman right, do you think it was somewhere around 1:00 when you left, one, p.m.?

A. Not having a watch, I would say it might have been around 1 or 1:30, at least.

Mr. McKnight: You may cross-examine.

CROSS-EXAMINATION

BY MR. HANRAHAN:

Q. Mr. Williams, on December 26th, after you were brought back to Des Moines, you went to Captain Leaming's office immediately; isn't that right?

A. Right.

Q. And Mr. McKnight was there?

A. Right.

Q. Later on you were taken back and booked in the jail?

A. Right.

Q. Did you send for Captain Leaming later on that evening?

A. Yes, I did.

Q. Did you have some conversation with Captain Leaming?

A. Yes. I wanted a phone call.

Q. Pardon?

A. I requested that he allow me to make a phone call.

Q. What was the rest of the conversation?

A. We discussed the activities in his office.

Q. What did you tell Captain Leaming?

A. Well, I couldn't quote it word for word, verbatim, but we discussed what went on in the office, and I gave him my opinion and he gave me his. That's as far as I would like to go on that question.

Q. You didn't discuss the case itself in that conversation?

A. No, there was no questions about the case.

Q. Mr. Williams, while you were in Davenport, were you advised of your constitutional rights?

A. Yes.

Q. Were you first advised of them by Lieutenant Ackerman?

A. Right.

Q. Did he make those clear to you?

A. Yes, he did.

Q. You didn't have any trouble understanding what he was trying to tell you?

A. No.

Q. And do you recall being taken before Judge Metcalf?

A. Yes.

Q. And did Judge Metcalf also advise you of those constitutional rights?

A. Yes.

Q. He made them quite clear to you, did he not?

A. Yes.

Q. And did you request a private audience with the Judge?

A. I did.

Q. And did the Judge grant you that?

A. Yes, he did.

Q. And then as you were leaving the court room, did you see attorney Kelly?

A. I saw Mr. Kelly, yes.

Q. Did you know Mr. Kelly prior to that time?

A. I did not.

Q. So you were advised he was an attorney?

A. Yes.

Q. And did you ask to speak to him?

A. In fact, I asked was he an attorney, and then I asked to speak to him, yes.

Q. I beg your pardon?

A. I asked if he was an attorney. I couldn't think of anything else he could be.

Q. And you were told he was?

A. Yes.

Q. And did you ask to visit with Mr. Kelly?

A. I did.

Q. Did Lieutenant Ackerman let you?

A. Yes.

Q. In private?

A. Yes.

Q. After Captain Leaming arrived in Davenport, that was after lunch you met him; is that right?

A. Yes.

Q. Did Captain Leaming advise you of your constitutional rights?

A. This I don't recall, because I can't see any necessity for him to advise me of my rights.

Q. You had been advised before?

A. Yes.

Q. Do you recall the weather when you were driving back to Des Moines?

A. You mean when they were driving back—yes.

Q. When you were coming back?

A. Yes.

Q. What was it like?

A. It was getting blizzardy. It was snowing and ice mixed. The roads were ice, getting slippery and so forth.

Q. Now in Davenport did you confer with Mr. Kelly on more than one occasion?

A. Yes, I did.

Q. I'm not going to ask you what that conversation was, but I assume you conferred with him about your problem?

A. Yes, I did.

Mr. Hanrahan: I believe that's all.

REDIRECT EXAMINATION

BY MR. McKNIGHT:

Q. Were you advised by Mr. Kelly that you were to do your talking when you got to your lawyer in Des Moines?

A. Yes.

Q. Do you recall how many stops you all made on your way back to Des Moines?

A. Three. Wait a minute, we made four, because they stopped to get some gas prior to leaving Davenport.

Q. Were you questioned by Mr. Leaming of whether or not you got some gas at a filling station?

A. Yes.

Q. Were you taken by there?

A. Yes.

Q. Were you taken by a rest area near Grinnell?

A. Yes.

Q. Now did I understand you to say that Captain Leaming said to you that they had knowledge or good reason to believe that the body was in Mitchellville?

A. Yes, he did make that statement. This was in the car on the way back to Des Moines.

Q. Had you at anytime before then said anything to them about anything like that?

A. I did not.

Q. Then were you carried to the area near Mitchellville?

A. Right.

Q. Was it off of the interstate?

A. Yes. In fact, to be specific, that statement was made at least twice, once after we had drank coffee at a rest area—not the rest area, the filling station. He said, "You might as well tell us where the body is, we have an idea it's near Mitchellville, and when we get back to Des Moines your attorney and you will accompany us back here and show us where the body is."

Mr. McKnight: That's all.

Mr. Hanrahan: Nothing further.

The Court: You may step down [S. T. pp. 23-31].

• • •

CLEATUS M. LEAMING,

Called as a witness on behalf of the plaintiff, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. HANRAHAN:

• • •

Q. And what is your occupation, Mr. Leaming?

A. Captain, police, City of Des Moines.

Q. And are you the chief of detectives in the Des Moines Police Department?

A. Yes, sir.

Q. And were you such on December 26, 1968?

A. Yes, sir.

Q. On that date had you been investigating and working on the matter of this missing ten year old girl, the Powers girl?

A. Yes, sir.

Q. And at that time she had been missing for two days; is that correct?

A. Yes.

Q. On December 26, 1968, did Mr. McKnight come to your office?

A. Yes, sir.

Q. Approximately what time, Captain?

A. 8:30, 8:45, a. m., in that area.

Q. And while he was there, did you receive a call from the Davenport Police Department?

A. Yes, sir.

Q. And did they inform you that Anthony Williams was in the Davenport Police Department?

A. Yes, sir.

Q. And did Mr. McKnight get on the telephone and have some conversation with Mr. Williams?

A. Yes, sir.

Q. Did you hear Mr. McKnight's end of that conversation?

A. Yes, sir.

Q. And after that conversation, were you to go to Davenport to get Mr. Williams?

A. Yes, sir.

Q. Prior to your going, did you have some conversation with Mr. McKnight?

A. Yes, sir.

Q. Was there any agreement between you and Mr. McKnight that you would not have conversation with Mr. Williams on the way back to Des Moines?

A. No, sir.

Q. Did he instruct or request you in any way not to interrogate or have conversation with Mr. Williams?

A. No, sir.

Q. What time did you leave Des Moines for Davenport?

A. Approximately 9:30, a. m.

Q. And who went with you?

A. Detective Nelson.

Q. And did you go straight to Davenport?

A. Yes, sir.

Q. What time did you arrive in Davenport?

A. Ten minutes till 12, noon [S. T. pp. 32, 33, 34].

* * *

Q. Did you have some conversation with Mr. Williams.

A. Yes, sir.

Q. What was that conversation at that time?

A. I advised him of his rights under Miranda and in addition to advising him of his rights, I told him that we both know that you're being represented here by Mr. Kelly and you're being represented by Mr. McKnight in Des Moines, and that I want you to remember this because we'll be visiting between here and Des Moines.

Q. Was Mr. Kelly present during this time?

A. Yes, sir [S. T. pp. 35, 36].

* * *

Q. Did Mr. Kelly go from the station to the car with you and Mr. Williams?

A. Yes, sir.

Q. Who drove the car back from Davenport?

A. Detective Nelson.

Q. And where were you and Mr. Williams in the car?

A. In the rear seat.

Q. Did Mr. Kelly ask you to ride back to Des Moines with you?

A. No, sir.

Q. Did Mr. Williams ask to have Mr. Kelly ride back to Des Moines?

A. No, sir.

Q. About what time was it when you left Davenport?

A. Two, p. m.

Q. Did you stop for gas in Davenport?

A. Yes, sir.

Q. Describe the weather at that time.

A. It was raining and sleeting and freezing as it—highway was becoming icy, and it was foggy to some extent.

Q. Did you have any conversation with Mr. Williams after you left Davenport?

A. Yes, sir.

Q. Did you interrogate Mr. Williams between Davenport and Des Moines?

A. No, sir.

Q. What was the nature of this conversation you were having with Mr. Williams?

A. Well, Mr. Williams was—

* * *

Mr. Williams was asking me a great deal of questions as to had I talked to different people who were acquaintances of his. What was their opinion of him. Had I in fact gone to their house and searched their houses or had I just talked to them and this sort of thing. We had quite a discussion relative to religion, he telling me about his interests in youth groups and we had conversation about him playing a piano and organ, singing, this sort of thing.

Q. You had quite a bit of conversation other than the particular case you were working on at that time?

A. A great deal of conversation not related to the case and some conversation related to the case.

Q. Who brought up the conversation regarding the missing Powers girl?

A. Mr. Williams.

Q. Did he tell you some things relative to the missing Powers child?

A. Yes, sir.

Q. And was this a result of your questioning or interrogating him?

A. No, sir.

Q. Did he ask you questions about the missing Powers child?

A. Yes, sir.

Q. Now as a result of his questions and his statements about the missing Powers child, did you obtain considerable knowledge about her and eventually find her body?

A. Yes, sir.

Q. That was on the way back from Davenport?

A. Yes, sir.

Q. And this knowledge and finding her body, those things are matters you testified to before the grand jury in this case; is that correct?

A. Yes, sir.

Q. And this is information which you passed on to the other officers involved in the case?

A. Yes, sir.

Q. Did Detective Nelson at any time interrogate the defendant on the way back from Davenport?

A. No, sir.

Q. Were any threats of any nature made upon Mr. Williams on the way back from Davenport, either by yourself or Mr. Nelson?

A. No, sir.

Q. Did Mr. Williams at any time say or indicate that he did not wish to talk to you on the way back from Davenport?

A. No, sir.

Q. Did he at any time say he wanted to have an attorney present before he talked to you?

A. Not in that particular manner, no, sir.

Q. Well, tell us in what manner, Captain.

A. He told me on several times, "When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." That would be the closest he would have come to it.

Q. Did you at any time tell Mr. Williams that Mr. McKnight told you to tell Williams that he was to tell you the whole story on the way back from Davenport?

A. No, sir.

Q. You stopped at a gasoline station on the way back from Davenport; is that correct?

A. Yes, sir.

Q. And how did that come about?

A. We stopped at two of them: The first one we stopped at was in the west edge of Davenport, and we stopped to get gasoline; the second one was a Skelly station on the north side of the freeway, and as we were driving along Mr. Williams said to me, "Did you ever find a girl's shoes?" And I said, "I don't know. There is a bunch of clothing that's been found in a trash receptacle, but they were found by BCI agents and highway patrol agents and so forth and I haven't had a chance to look them over and I don't know what they did find." I said, "However, if they were in the same receptacle with those other clothing, we would have them." And Mr. Williams said no, they weren't in there with the others, that he had taken them over to this Skelly station where there is a little restaurant attached to that he had stopped at their station and bought $2.00 worth of gasoline, that he had gone on around behind the station and put these shoes in an empty cardboard box which was sitting around behind the restaurant.

He described them as not really go-go-boots, but that they were high brown leather boot. [sic] That's the reason we stopped there.

Q. Did he point that station out to you?

A. He did, yes, sir.

Q. Did he do this voluntarily, on his own, or did you ask him to point it out?

A. No. He said that station—He nodded his head, that station right over there as we were coming along the freeway and at that time you could see it up there.

Q. And that's where you made a stop?

A. Yes, sir. Detective Nelson turned off and went up to that station and we in fact drove around behind it.

Q. Did you make another stop at a rest area on the way back?

A. Yes, sir.

Q. How did that come about?

A. Well, after we looked for those boots and we didn't find them, then we got back onto the freeway, Mr. Williams said, "Did you find the blanket?" And I said, "I don't know, if the blanket was with those same clothing." He said no, they were in the same room, but that they were over by the toilet area or something of this nature. So by this time we were just about to that rest area. However, we had to cross the freeway to get over to that side, so we went on and crossed over and came back and pulled up and stopped, and there were BCI agents in a car behind us. They came on up there and I told them we were looking for a blanket, and they said was there more than one blanket, and I said, "Well, I don't think so." And they said, "Well, that blanket has been recovered. We do have it." So at this point we continued on.

Q. Now these stops were not a result of your asking Mr. Williams any questions; is that correct?

A. No, sir.

Q. Was he talking all the way back?

A. We were both talking. He was talking a great deal, and I was talking to him a great deal, yes, sir.

Q. In your conversation with Mr. Kelly at Davenport, did he request or instruct you not to talk to Mr. Williams on the way back?

A. No, sir.

Mr. Hanrahan: That's all.

CROSS-EXAMINATION

BY MR. McKNIGHT:

Q. Officer, how long have you been on the police department?

A. 19 years and two months.

Q. Do you want us to believe that you didn't ask this defendant any questions, he just started talking?

A. No. I asked him a great many questions, but not pertaining to this case.

Q. And you know that the defendant had said that he would tell you the story when he got back to Henry T. McKnight?

A. Yes, he did, several times.

Q. But you kept getting what you could get before you got to Henry T. McKnight, didn't you?

A. We were talking, Mr. McKnight.

Q. Just answer the questions—

A. But not asking questions.

Q. But you kept getting what you could get before you got to Henry T. McKnight?

A. This is true, yes, sir.

Q. And you didn't have the least idea of where the body was, did you?

A. Yes, I did.

Q. Who did you get that from?

A. Theory.

Q. Just your theory?

A. That's right, yes, sir.

Q. And you did say to him, "I theorize that the body is at Mitchellville?"

A. I did, yes, sir, and I was right.

Q. Did you tell him I was having heart trouble?

A. No, sir.

Q. You didn't say that to him?

A. No, sir.

Q. You didn't say to him that your lawyer's sick and he had to go home and go to bed?

A. No, sir.

Q. You didn't even say that?

A. No, sir. Had some conversation along this line with Mr. Kelly.

Q. And now you deny that Mr. Kelly said that Mr. Williams will be questioned when he gets into Des Moines with his lawyer McKnight?

A. I do deny that, yes, sir [S. T. pp. 36-44].

• • •

Q. And that conversation, even though Williams had told you several times that he would tell everything he had to tell when he got to me, you kept talking till you got that information?

A. That's not quite the way he said it, Mr. McKnight. He said, "I will tell you the whole story after I see McKnight."

Q. Now obviously there was no lawyer there to assist him about what he told you?

A. In the car?

Q. Yes.

A. No, sir [S. T. p 45].

• • •

Q. Now how many stops did you make?

A. Well, I got to count. I stopped at the gas station in Davenport to gas up. I stopped at the Skelly station north of the freeway where Williams said he put Pamela Powers' boots.

Q. Just a minute. You want to tell us just out of the clear sky that Mr. Williams said to you, "I put the boots over there," and you hadn't asked him anything?

A. No, he didn't say that. He said, "Have you found the boots."

Q. What did you say?

A. I said I don't think so. I said, "Really, I don't know, because the clothing and articles that were found, I haven't had an opportunity to look at. Now if they were with the other clothing, we have them," and he said no, they weren't. "I put them over here at this Skelly station."

Q. He just volunteered that?

A. Yes, sir.

Q. Where else did you stop?

A. After we stopped at the Skelly station, we stopped very briefly at the Grinnell turn off rest area where the other articles of clothing were found to look for the blanket.

Q. Just a moment right there. You want to tell us you didn't ask him anything about the blanket?

A. No. I thought the blanket had been found. When we got back to the freeway, he said, "Did you find the blanket?" Again I said, "Was it with the other stuff?" He says no, it was in the same room, but it was over by the stools or something, so this is why we stopped there [S. T. pp. 46, 47].

Q. You didn't ask Williams any questions?

A. I beg your pardon?

Q. You didn't ask Williams any questions?

A. No, sir, I told him some things.

Q. You told him some things?

A. Yes, sir. Would you like to hear it?

Q. Yes.

A. All right. I said to Mr. Williams, I said, "Reverend, I'm going to tell you something. I don't want you to answer me, but I want you to think about it when we're driving down the road." I said, "I want you to observe the weather. It's raining and it's sleeting and it's freezing. Visibility is very poor. They are predicting snow for tonight. I think that we're going to be going right past where that body is, and if we should stop and find out where it is on the way in, her parents are going to be able to have a good Christian burial for their little daughter. If we don't and it does snow and if you're the only person that knows where this is and if you have only been there once, it's very possible that with snow on the ground you might not be able to find it. Now I just want you to think about that when we're driving down the road." That's all I said.

Q. About where were you when you said that?

A. Well, not very far out of Davenport. This is on the freeway.

Q. And now when you got to Mitchellville, did you ask him had he thought about it?

A. No. As we were coming towards Mitchellville, we'd still be east of Mitchellville a ways, he said to me, "How do you know that would be at Mitchellville?" And I said, "Well, I'm an investigator. This is my job, and I just figured it out." I said, "I don't know exactly where, but I do know it's somewhere in that area." He said, "You're right, and I'm going to show you where it is."

Q. He just voluntarily said, "You're right?"

A. That is correct, yes, sir.

Q. You didn't question him at all, didn't ask him any questions?

A. Beg your pardon?

Q. You didn't ask him any questions?

A. No. I told him [S. T. pp. 47-49].

* * *

Q. How many times did you say to him you wanted him to just think it over?

A. One time as near as I can remember.

Q. Did you hear me say in your office before you left, "Mr. Williams, you make no statement till you get to me."

A. No, sir.

Q. You didn't hear that?

A. No, sir. I didn't hear that.

Q. So you didn't hear me even talk to him, did you?

A. Yes, I did. I heard you talk to somebody.

Q. Did you say to me, "We are going to Davenport and bring Mr. Williams straight back to Des Moines and you all wait here."

A. No, sir, not just like that.

Q. Not just like that. What do you mean, not like that?

A. Well, that wasn't the conversation, Mr. McKnight.

Q. Now obviously, officer, you had some conversation with me about that any conversation with Mr. Williams would be taken when you got back in your office; don't you remember that?

A. We had some similar conversation of that, but not just like that, no.

Q. Even after you got back you said to me, "We're going to sit down and have coffee and we're going to have the conversation." Isn't that what you said?

A. I asked you to have a cup of coffee.

Q. Wait a minute, officer, don't you mean to say that you didn't say to me that we wanted to have this conversation?

A. It's possible I said that because I was looking forward to one.

Q. Yes. Well, how come you're looking forward to one if you didn't know you were going to have one before you left?

A. We did have conversation along those lines, but not just in a manner in which you're putting it.

Q. Along those lines. So you was expecting me to sit down when he got back, when he had assistance of counsel, you knew

that, didn't you?

A. Yes. He even told me that.

Q. He even told you?

A. Right.

Q. All right, then. So there was some understanding before you even left here that the conversation would take place here in Des Moines?

A. Some would, yes [S. T. pp. 50, 51].

• • •

REDIRECT EXAMINATION

By MR. HANRAHAN:

Q. Captain Leaming, prior to the defendant showing you where the body was, had you told him you thought it was in the Mitchellville area.

A. Yes, sir.

Q. And would you tell us how you arrived at this belief you had?

A. Well, they had found the clothing in the Grinnell area. They had searched the entire Grinnell area and the Newton area and they hadn't found anything. They found this clothing. I felt that she probably was nude or nearly nude. In my thinking, I figured that he had probably got rid of the body as soon as he possibly could after he left Des Moines. I felt that it wasn't in the Grinnell area, it wasn't in the Newton area. So I then thought probably as quick as he could get out of Des Moines he would dispose of the body. I first thought of Altoona and I had thought, no, when you're on a freeway, this feels like you're still in Des Moines when you hit that, so I thought of Colfax. And I thought no, their search around Newton probably extended as far as Colfax, so I figured Mitchellville.

Q. Now he told you when he got back to Des Moines with Mr. McKnight he would tell you the whole story; when did he make that statement?

A. Well, he told me this not too long after we got on the freeway, after we had gassed up and started — gotten on the

freeway and started towards Des Moines. He told me that the first time.

Q. Now what about this car that was following you, who was in that car?

A. State agents.

Q. And what is the purpose of this car following you?

A. It was agreed before we left Davenport Police Department that the state agents would follow me into Des Moines in the event that we would run off the road or slide off the road, they had a radio in their car, they had contact with the state radio and the highway patrol and so forth, which I didn't have. Also, if we would go off the road or anything, they could take me and the prisoner and continue on into Des Moines. This is the reason.

Q. Did you explain this to Mr. Williams?

A. I did, yes, sir.

Q. And did he express any fear for this car that was following you?

A. No. He asked me who they were and what they were there for, and I explained this to him and added that, "These are policemen, they're here for your protection. They have radio communication and so forth which I don't have in this squad car. I only have the state radio."

Q. And your radio was worthless out that far from Des Moines?

A. Yes. You can't get anybody when you're out a certain distance out of Des Moines, why, you can't get Des Moines or highway patrol or anybody with our radio.

Q. This other car had a statewide radio; is that correct?

A. Yes, sir [S. T. pp. 52-54].

• • •

The following excerpts of testimony are taken from the transcript of the trial held April 30, 1969, in Polk County District Court, before the Honorable J. P. Denato, Judge.

DANNY CUPPLES,

called as a witness on behalf of the plaintiff, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. HANRAHAN:

• • •

Q. What is your occupation, Mr. Cupples?

A. Me and my brother run a truck stop off the interstate.

Q. And where is it located?

A. On Interstate 80 at Grinnell [T. T. p. 115].[3]

• • •

Q. Were you working at the truck stop on December 24th, 1968?

A. Yes.

Q. What hours did you work that day?

A. About ten in the morning, around midnight.

Q. Now do you see a man in this courtroom now known to you as Robert Williams or Anthony Erthell Williams?

A. That's him sitting right there.

Q. Would you point to him again, please.

A. Right there.

MR. HANRAHAN: Let the record show the witness has pointed to the defendant.

Q. Did you see him on December 24th, 1968?

A. Yes.

Q. You will have to speak up.

A. Yes.

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3 The abbreviation T. T. shall stand for Trial Transcript.

Q. Where did you see him?

A. Well, he pulled up to get some gas [T. T. pp. 116, 117].

• • •

Q. Then did you see him after that?

A. I seen him when the detectives brought him back.

Q. When was that?

A. That was a couple days after that.

Q. Couple days after that?

A. (Witness nods head.)

Q. Was he in custody of two detectives then?

A. Yes.

Q. Do you know who they were?

A. The detectives? That was the first time I seen them, that was the only time I have seen them.

Q. Did they stop at the service station on that day?

A. Yeah, they pulled around in back.

Q. Were you back there?

A. Well, no they come up and got me.

Q. And then did you go back there?

A. Yeah.

Q. Did you see Williams at that time?

A. Yeah.

Q. What was he doing?

A. He was sitting—

• • •

A. He was sitting in the back seat.

Q. Of—go ahead.

A. Of the detectives' car, you know, both the detectives were outside the car. He was sitting in the back seat [T. T. pp. 119, 120].

• • •

(Thereupon, the following record was made in chambers out of the presence and hearing of the jury:) [T. T. p. 121].

• • •

ANTHONY ERTHELL WILLIAMS,

called as a witness in his own behalf, being first duly sworn by the Court testified as follows:

EXAMINATION

BY MR. McKNIGHT:

Q. Mr. Williams, how old are you?

A. Twenty-five.

Q. When did you come to Des Moines?

A. On or about July the 6th.

Q. 19 what?

A. '68.

Q. And where had you been living just before you came to Des Moines?

A. Fulton State Hospital.

Q. Is that a mental hospital?

A. Yes.

Q. How long were you there?

A. Approximately three years.

Q. Were you discharged?

A. No.

Q. Did you escape?

A. Yes, in a manner of speaking.

Q. Now when you were in Rock Island, Illinois, on or about the 26th of December, did you have a conversation with Henry T. McKnight?

A. Yes.

Q. Did you agree to surrender?

A. Yes.

Q. Did you surrender?

A. Yes.

Q. Where did you surrender?

A. Davenport, Iowa.

Q. Was there a conversation between Henry T. McKnight and you after you surrendered to the Davenport police?

A. Yes.

Q. What was the final instructions that you got from Henry T. McKnight?

A. Not to talk to any of them until I returned to Des Moines.

Q. Did you say you would do that?

A. Yes.

Q. Did you see a Mr. Kelly there?

A. Yes.

Q. Was this Kelly a lawyer?

A. Yes.

Q. Did you hire Mr. Kelly?

A. No.

Q. Let me ask you this: Did Mr. Kelly have any conversation with Mr. Leaming in your presence just before you left Davenport?

A. Yes.

Q. Do you remember what he said to them?

A. Something to the effect of he's not to say anything until he gets back to Des Moines, or he won't do any talking until he returns to Des Moines.

Q. All right. Now after you got in the car on the way back to Des Moines, where were you seated?

A. In the back seat.

Q. Who was back there with you?

A. Leaming.

Q. What if anything did Leaming say to you?

A. He said a number of things, centering around, that you were ill and that you had—something that happened to your heart during the day, and that they knew the body was near Mitchellville, and also that I best—it would be better to show it to them now because you wouldn't want to come back and that you had already instructed them as soon as I got to Des Moines that we would come back and show them where the body was.

Q. And did he say anything further about this matter relative to the weather conditions?

A. That the streets were slippery and it was blizzardy and it would be late in the night getting back, or it might even lead to the early hours of the morning.

Q. Did you, after hearing that, finally agree to show him what you knew about the body?

A. Yes.

Q. Is that the reason you agreed to it, as a result of what he said?

A. Exactly.

Q. You didn't know whether I had had a heart attack or not, did you?

A. No [T. T. pp. 123-126].

* * *

(Thereupon, the following proceedings were had in open court in the presence and hearing of the jury:)

DANNY CUPPLES

DIRECT EXAMINATION (continued)

BY MR. HANRAHAN:

* * *

Q. And then I asked you if you and Mr. Williams had any conversation.

A. Yeah.

Q. And what was that conversation?

* * *

A. He said to me, he said, "You are the one that sold me my gas, aren't you?" And I said, "Yeah."

Q. Was that the extent of the conversation between you and Williams?

A. Yeah, between me and him.

Q. Did you hear any conversation between Williams and the two detectives that were with him?

A. Yes.

Q. And what was that conversation?

* * *

A. There was two detectives there, and one of them said to Williams, he said, "Now where did you put the boots at?" And he said, he pointed there behind the building and he said, "In a container over there." [T. T. pp. 127, 128].

* * *

JOHN D. ACKERMAN, SR.,

called as a witness on behalf of the plaintiff, being first duly sworn by the court, testified as follows:

CROSS-EXAMINATION

BY MR. McKNIGHT:

* * *

Q. Now didn't you yourself want to question this defendant?

A. Yes, sir, I did.

Q. What did he say to you?

A. I only asked him one question, where was the little girl and was she safe. I told him that we were worried about the safety and the health of the little girl, and if she was alive and if she was in the area, we would like to know so that we could get help to her.

Q. Did he tell you that you ask my lawyer anything you want to know?

A. No, sir, he did not.

Q. What did he say?

A. He said, "Don't you know."

Q. Then what did he say?

A. I says, "Know what?" And, "My lawyer knows."

Q. He said his lawyer knows?

A. His lawyer knows, and that's all that was said [T. T. p. 210].

* * *

Q. Now let's forget about this violation of the constitutional rights. Let me ask you this: Was Leaming standing present when Mr. Kelly said that the defendant will do no talking till he gets to Des Moines to McKnight?

A. No. Captain Leaming and Detective Knox had not arrived yet at this time. This is when Mr. Kelly and Williams came out of our interrogation room.

Q. I see. Now you didn't hear any conversation between Kelly, the defendant and Leaming?

A. No, sir, I did not [T .T. p. 211].

* * *

CLEATUS M. LEAMING,

called as a witness on behalf of the plaintiff, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. HANRAHAN:

Q. (By Mr. Hanrahan) Now to boil this all down, Captain, on December 25th, 1968, while you were in Davenport, were you looking for the defendant here?

A. Yes, sir.

Q. Did you return to Davenport, Iowa, on December 26th, 1968?

A. Yes, sir.

Q. Who went with you at that time?

A. Detective Arthur Nelson.

Q. What time did you arrive in Davenport?

A. Arrived at the Davenport Police Department at ten minutes till 12.

Q. What did you do after you got there?

A. We were advised that the Anthony Williams had just been served his lunch, so we ourselves went to lunch.

Q. And after lunch, did you return to the police station?

A. Yes, sir.

Q. What time would that have been?

A. Approximately ten minutes till 1.

Q. At that time did you meet the defendant Williams here?

A. Yes, sir.

Q. Had you known him prior to that time?

A. No, sir.

Q. Who if anybody was with Williams when you met him?

A. Mr. Kelly and—

Q. Excuse me, is that Tom Kelly, a lawyer in Davenport?

A. Yes, sir. And Lieutenant Ackerman of the Davenport Police Department.

Q. Did you have any conversation with Williams when you first met him?

A. Yes, sir.

Q. What was that conversation?

A. Well, Mr. Kelly, the attorney, introduced me to Mr. Williams and advised him that I had something to tell him. At that point I asked Mr. Williams if he had been advised of his constitutional rights. He stated that he had. I advised him that I was going to advise him again, and I did advise him.

Q. At that time did you advise him of his rights?

A. Yes, sir.

Q. What did you tell him in regard to his rights?

A. I told him that he had a right to remain silent, that anything he said to me would be used against him in a court of law, that he had a right to an attorney present during any questioning, that if he could not afford an attorney the Court would appoint one for him. I further added that, however, you and I both know that you are represented by counsel here, Mr. Kelly, and you are represented by Mr. McKnight in Des Moines, and do you fully understand that. He stated yes, that he did.

I then further advised him that I wanted him to be sure to remember what I had just told him because it was a long ride back to Des Moines and he and I would be visiting.

Q. What happened after you advised him of his rights, Captain?

A. He requested to talk to his attorney Kelly alone.

Q. And did he?

A. Yes, sir.

Q. And how long did that talk last?

A. Approximately twenty minutes.

Q. And then what happened?

A. Lieutenant Ackerman and myself re-entered the room along with Detective Nelson, and prepared to place handcuffs on Mr. Williams. At this point Mr. Williams requested to talk to Attorney Kelly alone again.

Q. This was a second time?

A. Yes, sir.

Q. And was that wish granted?

A. Yes, sir.

Q. How long did he talk to him at this time?

A. Approximately ten or fifteen minutes [T. T. pp. 214-217].

• • •

Q. Then what did you do, Captain?

A. We had some conversation relative to news media, cameras and so forth.

Q. Who was this conversation with?

A. Mr. Kelly and Mr. Williams.

Q. What was that conversation?

A. Attorney Kelly stated that Mr. Williams did not wish publicity and that he would like to arrange to take him to a car in such a manner that he might possibly be able to place his briefcase in front of Mr. Williams' face to avoid some of the publicity and so forth.

Q. Where was your police car at this time?

A. Directly behind the Davenport Police Department, would be at the rear door.

Q. And did you leave the Police Department, the police station at this time?

A. Yes, sir.

Q. Did you leave by that rear door?

A. Yes, sir.

Q. Now who went from the police station to your police car?

A. Attorney Kelly, Mr. Williams, Detective Nelson and myself.

Q. Did you place Williams in the car at that time?

A. Mr. Kelly placed him in the rear seat.

Q. Did you get into the car?

A. Yes, sir.

Q. Which seat?

A. Rear seat.

Q. And Detective Nelson?

A. Yes, sir, he got behind the wheel.

Q. He was driving the car?

A. Yes, sir.

Q. Just the three of you in the car?

A. That's all.

Q. Did you leave the Davenport police station at that time?

A. Yes, sir.

Q. Where did you go from there?

A. Went to the west edge of Davenport where we stopped at a filling station and gassed up.

Q. Anybody get out of the car at that time?

A. Detective Nelson got out and paid for the gas.

Q. Did you and Williams stay in the car?

A. Yes, sir.

Q. Where did you go from there?

A. Went directly to the freeway, Interstate 80, and headed west toward Des Moines.

Q. Did you have any conversation with Williams at this time?

Mr. McKnight: Did you hear Mr. Kelly say that the defendant would make no statement till he got to Des Moines?

The Witness: No, sir.

Mr. McKnight: Did you hear Mr. Kelly say that he didn't want to talk till he got to his lawyer in Des Moines, McKnight?

The Witness: No, sir.

Mr. McKnight: Did you hear McKnight tell this defendant over the phone, when I was standing by you at approximately 9 a.m., on the 26th, he was to do no talking till he got to Des Moines?

The Witness: No, sir.

Mr. McKnight: You didn't hear that?

The Witness: No, sir.

Mr. McKnight: You were standing there, though?

The Witness: Yes, sir.

Mr. McKnight: Heard me talking?

The Witness: Yes, sir.

Mr. McKnight: But you didn't hear that?

The Witness: No, sir.

Mr. McKnight: Now the defendant had no lawyer out there with him, did he, on the highway?

The Witness: In the car?

Mr. McKnight: Yes.

The Witness: No, sir.

Mr. McKnight: You had information and you knew you had with you a patient that had escaped from a mental hospital?

The Witness: Yes, sir.

Mr. McKnight: Then you started talking to him?

The Witness: He started talking [T. T. pp. 217-221].

Mr. McKnight: All right. Now we object to this, any conversation that he had with defendant on the way from Davenport to Des Moines, for the same was in violation of the defendant's constitutional rights to have a lawyer present at every stage of the game; for the further reason, the officer knew he had a mental patient and that said statements made were not voluntarily made and the defendant could not effectively waive the right to have a lawyer.

Q. (By Mr. Hanrahan) After leaving this service station in Davenport, you went to the interstate; is that correct?

A. Yes, sir.

Q. How far was this service station from the interstate?

A. Probably a mile.

Q. Now after you left the service station, I believe you testified there was some conversation?

A. Yes, sir.

Q. Who initiated that conversation?

A. Mr. Williams.

Q. What was that conversation? [T. T. p. 221].

Mr. McKnight: Now just a moment. So that I won't have to continue to object, I'll put in the objection once unless the thing changes, I'll ask that it stand, any conversation, admissions and demonstrations or acts of the defendant from Davenport to Des Moines is objected to on the constitutional question heretofore urged.

The Court: It may stand so far as the Court is concerned. Is that agreeable?

Mr. Hanrahan: That's agreeable.

Q. (By Mr. Hanrahan) What was the first conversation you had with Williams from that point on?

A. Mr. Williams asked me if I hated him and if I wished to kill him. I told him I did not hate him, I did not wish to kill him.

As far as I was concerned, he was just another prisoner, and that this was not my attitude, and that this was probably one of the reasons that I was sent to get him, that I did have such an attitude. Also advised him that I myself had had religious training and background as a child, and that I would probably come more near praying for him than I would to abuse him or strike him. And I had no intentions of injuring him in any way, and that I felt myself to be a good police officer and I had every intention of protecting him and not abusing him or allowing anyone else to molest or abuse him in any manner while he was in my custody.

Q. Go back just a minute, Captain, there were just the three of you in the car?

A. Yes, sir.

Q. Was there another car involved?

A. Yes, sir.

Q. Tell us what that car was.

A. There was a BCI car, which is the Bureau of Criminal Investigation, State Agent Jutte was following us from Davenport all the way to Des Moines.

Q. What was the purpose of having the state car follow you?

A. Well, number one, we had very hazardous weather. It was raining and sleeting and freezing. It was very slick on the highway. We had no state police radio in our car. We had a Des Moines city vehicle with a city radio in it, which is useless out in the state. We did not have contact with even our own department. We are too far out.

Mr. Jutte, state agent, was to follow us in the event that we slid off the road or had any problems at all with our prisoner. He was there to assist us. He had a radio, had contact with the state, he could call us a tow truck or he could call for a highway patrol or he could transfer the prisoner and myself into his car and bring us on into Des Moines if the need arose.

Q. Did you have some further conversation with Mr. Williams?

A. Yes, sir.

Q. And what was that?

A. Well, Mr. Williams was very talkative, and he was asking me who we had talked to that were friends of his, if we talked to the reverend from the church, if we talked to Mr. John Searcy, if we had checked for fingerprints in his room at the YMCA, and we discussed religion. We discussed intelligence of other people. We discussed police procedures, organizing youth groups, singing, playing a piano, playing an organ, and this sort of thing.

Eventually, as we were traveling along there, I said to Mr. Williams that, "I want to give you something to think about while we're traveling down the road." I said, "Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

At that point Mr. Williams asked me why I should feel that we would be going right by it. I told him that I knew it was somewhere in the Mitchellville area and I didn't know exactly where, but I did know that it was somewhere in the Mitchellville area, and I felt that we should stop and look.

I stated further, "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." This was not mentioned again until way on further down the road. As we approached the Grinnell turn-off proceeding west on Interstate 80, Williams said to me, "Did you find her shoes?" I said that I did not know whether the shoes had been found or not, that the BCI agents and the highway patrol had found some articles of clothing at the Grinnell rest area, turn-off rest area. But at this point I did not know what they had found.

I stated that if the shoes were with the articles in the rest area, they had been found, and if they weren't there, they hadn't been found. Williams said, "No, I didn't put them with the rest of the clothing." He at this point nodded his head north of the freeway where there was a Skelly station and said, "I put the shoes right up there, that filling station." He said, "I went up there and I bought $2 worth of gas." He said, "There is a little restaurant right there with the oil station." He said, "I went around behind the building and dropped the shoes into an empty cardboard box."

I asked him what kind of shoes they were. He said they were brown leather. I asked him if they were go-go boots. He said no, that they weren't exactly go-go boots, but they were high boots of this type.

* * *

Q. (By Mr. Hanrahan) After this conversation, Captain, what did you do?

A. Drove to the filling station.

Q. And do you know the name of this filling station?

A. Only that it's a Skelly station.

Q. What does this station consist of?

A. Well, it's an ordinary filling station. I believe it has a grease room and it has pumps out in front of it, and that on the south of the filling station there is a restaurant.

Q. And you went to this station?

A. Yes, sir.

Q. And what did you do when you drove to the station?

A. Drove right around behind the building where the box was supposed to be.

Q. Did you get out of the car there?

A. Yes, sir [T. T. pp. 222-227].

* * *

Q. Did you search for these boots at this time?

A. Yes, sir.

Q. Did you find them?

A. No, sir.

Q. Now how long were you there at the station?

A. Probably twenty minutes.

Q. Did you do anything else other than search for the boots?

A. Yes, sir.

Q. What was that?

A. I got a cup of coffee for Mr. Williams and one for myself and one for Detective Nelson, and we drank it.

Q. Did you take the handcuffs off of him at that time?

A. Yes, sir.

Q. Was he in the car or out of the car at that time?

A. Out of the car [T. T. p. 228].

* * *

Q. Then after you drank your coffee, what did you do?

A. Detective Nelson placed the handcuffs back on Williams, again behind his back. He and I got into the back seat of the car and Detective Nelson got under the wheel and we went back to the freeway [T. T. p. 229].

* * *

Q. Did you go directly back to the interstate then?

A. Yes, sir.

Q. Proceed back toward Des Moines?

A. Yes.

Q. Did you have any conversation with Williams at this time?

A. Yes.

Q. Would you tell us what that was, please.

A. Well, just as soon as we got on the freeway and started west, he said, "Did you find the blanket." And again I said I don't know, if it was with the other clothing in a trash receptacle,

Mr. McKnight: I would ask counsel to proceed with question and answer, please, Your Honor.

The Court: Proceed.

Q. Did you turn off the interstate after this?

A. Yes, sir.

Q. State whether or not Williams showed you where to turn off.

A. Yes.

Q. Do you know the name of the street or the highway on which you turned off?

A. It's the Mitchellville turn-off, and when you get south a ways, it's 112th Street Northeast, but I don't know whether it is where you go under the interstate or not [T. T. pp. 231, 232].

• • •

Q. Did you observe the body of Pamela Powers at that time?

A. Yes, I did.

Q. Would you describe the body, please.

A. Well, it was a white female, appeared to be frozen, her legs were in a drawn up position, she was lying in a ditch beside of a cement culvert, kind of down in the ditch, weeds were kind of pulled over her. She had snow on her, she was laying with her head pretty much toward the north and her head was back in such a position that from the road you could not see her face. She was disrobed with exception of a small T-shirt, I would call it [T. T. p. 243].

• • •

Q. Did you get down off the road to examine or look at the body?

A. Yes, sir.

Q. Then after you went and looked at the body, what did you do?

A. I went back to the car.

Q. Was Williams in the car at that time?

A. Yes, sir, he and Detective Nelson.

why, it was found. He said, no, he didn't put it in the trash receptacle, he put it in the same room but it was over by a toilet.

Q. What did you do then?

A. Oh, by this point we were just going past the rest area so we went to the first place we could turn around and went back to the rest area [T. T. pp. 229, 230].

• • •

Q. Did you find the blanket at that time?

A. No, sir [T. T. p. 231].

• • •

Q. So did you get back in your cars then?

A. Yes, sir.

Q. Back to the interstate?

A. Yes, sir.

Q. And did you proceed on toward Des Moines?

A. Yes, sir.

Q. I guess you would have—

A. We had to go a little bit east and another turn-around to head back toward Des Moines.

Q. Then did you have any more conversation with Williams after that?

A. Yes, sir.

Q. What was that, please?

A. Well, we had further discussions about people and religion and intelligence and friends of his, and what people's opinion was of him and so forth. And, oh, some distance still east of the Mitchellville turn-off he said, "I am going to show you where the body is." He said, "How did you know that it was by Mitchellville?" I told him that this was our job to find out such things and I just knew that it was in that area.

Q. Williams have anything to say at that time?

A. Yes, sir.

Q. And what was that?

A. He asked me if I saw her, if I saw the body. I told him I did. And he asked me, "What did she look like?" I told him she looked like she was frozen and looked like she was dead. He asked me if I saw her face and I told him no, I didn't, and he asked me to go back and look at her face, which I did. And I returned to the car, he asked me what I observed about her face. I asked him what he meant. He said, "Well, how did she look." I said, "Well, there would appear to me to be blood around her mouth," and he said, "Yes. Did you notice any discoloration around her eyes?" I said yes, I did, quite a little. He said, "What does that tell you about the way she died?" I said, "Well, in her frozen condition, me not being a doctor, I can't tell too much about it." He said, "Well, you have had a great deal of experience in these sort of things, surely this should tell you something about the way she died." I said, "Well, it would still have to be my opinion that she was either strangled or smothered," and he nodded his head, didn't say anything [T. T. pp. 244, 245].

• • •

Q. Captain, I show you State's Exhibit P, ask you to state what that is, if you know.

A. Yes, sir. That's the body of Pamela Powers as seen in the ditch, the scene I described out by Mitchellville.

Q. Now is Exhibit P, had some snow been brushed off her—

A. Yes, sir.

Q. —from when you first saw her. Captain Leaming, state whether or not Williams told you anything about placing the body in this particular spot.

A. Yes, sir, he did.

Q. What was that?

A. He said that when he arrived at this spot he was going to put her, he had her wrapped in a blanket and clothing and all wrapped together. He was going to take the whole works and

put it in the ditch, but when he lifted her out of the car that she fell out of the blanket and fell onto the ground and that the house, first house east, there was a car out there and he was afraid that they might come down there and discover him, so he just threw the articles of clothing back into the car and put the body in the ditch, and then later disposed of the clothing and the blanket.

Q. State whether or not at any time prior to finding the body he described the way she would be dressed.

A. Yes, sir. At the time that he—when we were on Interstate 80, before we got to the Grinnell area or to the Mitchellville area, when he stated that he was going to show us where the body was, I asked him if she was clothed and if she had anything wrapped around her, and he said no, that she was nude for the exception of a little blouse.

Mr. Hanrahan: That's all.

CROSS-EXAMINATION

BY MR. McKNIGHT:

Q. Captain, how long have you been on the police force?

A. Nineteen and a half years.

Q. This about the talkingest prisoner you have ever seen, wasn't it?

A. Real good talker, yes, sir.

Q. Unusual, isn't it?

A. Well, you don't get too many of them.

Q. That's what I thought. Now let me ask you this, let's go back to the beginning, do you remember when Henry McKnight walked into the detective office on the morning of the 26th?

A. Yes, sir.

Q. About what time was it?

A. About ten minutes till nine.

Q. All right. Did I say anything?

A. Yes, sir.

Q. What did I say?

A. You said that you had received two phone calls from Mr. Williams, one from Rock Island and one from Moline, and that he had talked to you and you had advised him to turn himself in to the Davenport Police Department, that you had told him if he turned himself in in Illinois that it would probably be after the first of the year before we could get him back to Des Moines, that you had told him that if he would go over—that he should go to Davenport and turn himself in to the police department and he told you that he would. And you told him that if he kept his word with you and did go turn himself in, that you would do everything you could to try to help him.

Q. All right. Now while we were there, did we get a call?

A. Yes, sir.

Q. From Davenport?

A. Yes, sir.

Q. And do you know the substance of what was said?

A. Yes, sir.

Q. What was that?

A. The phone call I got, are you referring to?

Q. Yes.

A. At approximately two minutes after nine, I received a call from the Davenport Police Department. They stated that Williams had turned himself in, that he was there, that he was on the telephone attempting to call his attorney Mr. McKnight.

Q. Weren't you told then by Lieutenant Ackerman that this man won't talk until he sees McKnight?

A. No, sir.

Q. You deny that?

A. I deny that [T. T. pp. 247-250].

* * *

Q. He didn't say anything about this man isn't going to talk till he sees McKnight?

A. Not to my knowledge, no, sir.

Q. All right. Now listen, Captain, did you hear me talking to Williams?

A. Yes, sir.

Q. How far were you from me?

A. About three feet.

Q. Three feet. Well, let me get up, were you as close as I am to you now?

A. No, sir.

Q. About how far were you?

A. About three feet.

Q. Let's go back there and correct. Where was your phone?

A. Right behind my desk.

Q. All right. Now didn't I talk on that phone?

A. Yes, sir.

Q. And you say that's three feet from you?

A. It's got a cord on it. You were standing up, I believe, Mr. McKnight.

Q. Now wasn't I standing in front of the desk originally?

A. Yes, sir.

Q. Didn't I walk around to the back of the desk where the phone was?

A. Yes, sir.

Q. And weren't you sitting right there in the chair?

A. Yes, sir.

Q. And you want to say I was three feet from you?

A. Yes, sir.

Q. All right. Do you want to say there is three feet between your desk and where that telephone was sitting?

A. No, sir.

Q. All right. Didn't you hear me say, "Williams, these gentlemen are coming after you and bringing you straight back to Des Moines."

A. Something to that effect, yes.

Q. All right. Didn't you hear me say, "You make no statement till you get here and we'll clear this matter up when you get here in Des Moines and we'll have a conference."

A. No, sir, not in that manner.

Q. I didn't say that?

A. No, sir.

Q. Well, now let me stop you right here and ask you this: When you came in with Williams, did you say to me, "We'll now have our conference and some coffee."

A. No, sir.

Q. You deny you said, "We'll have some coffee and a conference.'

A. I don't deny the coffee part. I didn't get a chance to say anything about any conference.

Q. Wait a minute. Wait a minute. Didn't you say about a conference and did I say to you, "What kind of conference can you have with me?"

A. I think you said that.

Q. All right. Now why would I say that if you hadn't said anything?

A. You were awful mad, Mr. McKnight. I don't know why you said what you said.

Q. Didn't I say you double-crossed me?

A. Yes, you did.

Q. All right. Now let me ask you this, let's go back: Do you deny that Kelly said to you that this man will make no statement till he gets to Des Moines to his lawyer?

A. I deny that, yes, sir.

* * *

Q. Do you deny that you told this prisoner McKnight's got a heart attack and he had to go home and go to bed?

A. I do deny that, absolutely.

Q. Didn't say anything about that?

A. Didn't say anything that sounded like that.

Q. How did it sound?

A. You want me to tell you what I said about that?

Q. Yes, about the heart attack.

A. I told him that you would be waiting for us in Des Moines, that this shook you up quite a little in talking to him and that you did say something to me about going home for a little while. But you would be back when we got there.

Q. All right. You told him and you knew when you was out there that I was waiting for you, didn't you?

A. Yes, sir, I told him so [T. T. pp. 251-254].

* * *

Q. And you want us to believe you didn't ask him no questions about the body or about the Powers girl?

A. About what?

Q. About the Powers girl.

A. I couldn't say I asked him no questions.

Q. You in fact asked him a lot of them, didn't you?

A. Well, I asked him some in reference to, is this the right direction or, we're starting to go north—

Q. Isn't it a fact when you were right out here, you said look here, you're lying to me, you know there ain't nothing here; didn't you say that?

A. No, sir.

Q. Now there is no question, you didn't advise him anything about his rights out there, did you?

A. No, sir.

Q. And there is no question about he's not a lawyer?

A. No, sir.

Q. And there is no question, you knew he was a mental patient?

A. That's right.

Q. Now let me ask you this: When you said to him you say you said to him it's snowing out here, bad weather, isn't that what you said to him?

A. Yes, sir.

Q. He didn't ask you that, did he?

A. No.

Q. Didn't you say that to him to induce him to show you where the body was?

A. I was hoping he would.

Q. You was hoping he would?

A. Yes, sir.

Q. So you wanted to make it appear to him that it might be harder or impossible to get out there the next day, you told him there was going to come a big snow, didn't you?

A. No, I didn't tell him there was going to come a big snow. I asked him to observe the weather, observe the visibility, observe it sleeting and it raining and they're predicting snow for tonight.

Q. And that was for the purpose of inducing him to talk, wasn't it?

A. Telling the truth.

Q. Well, I said, wasn't that for the purpose of getting Mr. Williams to talk?

A. Well, I was hoping he would tell me where the body was, Mr. McKnight, absolutely.

Q. And I think you said a while ago you figured I was there waiting in Des Moines for you, right?

A. Yes, sir.

Q. What time do you think you got there, to Des Moines?

A. Probably between 7 and 7:30.

Q. You didn't once call in and tell them to tell McKnight we've got his client out here and he's showing us everything, did you?

A. No, sir.

Q. And you knew I was there waiting for him?

A. Yes, sir [T. T. pp. 256-258].

* * *

Q. Now you did say to the defendant, you are the only person that can tell us where this body is; didn't you say that to him?

A. Yes, sir.

Q. Wouldn't you consider that a form of interrogation?

A. No. A statement.

Q. Statement. Didn't you make this statement: I know that this body is in the Mitchellville area, you just as well tell us?

A. No, sir, not in that manner.

Q. Well, didn't you say something to that effect?

A. Yes, something to that effect.

Q. And you didn't know that at all, did you?

A. I had a pretty good idea it was.

Q. But you didn't know it, did you?

A. Not positively, no, sir.

Q. And when you said that, you wasn't telling him the truth, were you?

A. Not one thousand per cent, no, sir.

Q. Not one thousand per cent. You made that statement to induce him to tell you, didn't you?

A. I made it hoping that he would [T. T. pp. 259, 260].

* * *

Q. Now is it your statement that Williams started to questioning you first when you got out on Interstate 80 coming back to Des Moines?

A. Yes, sir.

Q. Do you remember testifying here once before in this courtroom in regards that you made a statement to Williams first?

A. Oh, I remember testifying here and very possibly I did.

Q. Well, did you or didn't you?

A. Well, we were talking, Mr. McKnight, I think the statement I made here today was after we got out on the freeway and he started talking to me, we traveled from the police station up to the gas station and over to the freeway before that, we had some conversation.

Q. Well, now, when you got out on the freeway, didn't you testify once before that you said you wanted to make a statement to Williams; do you remember that?

A. Yes, sir, I did.

Q. Now had Williams said anything to you before then about the Powers child?

A. Before I mentioned to him that I want you to observe the weather and so on and so forth?

Q. Yes.

A. Yes.

Q. Where was this?

A. Well, first thing he asked me was, if I hate him and I want to kill him. This was right after we got on the freeway, after we left Davenport or after we gassed up, got on the freeway.

Q. And that was right after you got the gas and got on the freeway?

A. Yes, sir [T. T. pp. 261, 262].

* * *

Q. He said you all want to shoot me or something, didn't he?

A. He said, "I'll bet those guys wish I would jump out and run so they could shoot me."

Q. Now when you left, just before you left, do you remember we had parted greetings and didn't you say, "I'll go get him and bring him right back here to Des Moines?"

A. Yes, sir.

Q. You said that to me, didn't you?

A. Yes, sir.

Q. Knowing that you were dealing with a person from a mental hospital, did you say to him, you don't have to tell me this information, did you say that to him out there on the highway?

A. What information?

Q. The information that he gave you, the defendant gave you, you didn't say that to him, did you?

A. No, sir.

Q. In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren't you?

A. I was sure hoping to find out where that little girl was, yes, sir.

* * *

Q. Well, I'll put it this way: You was hoping to get all the information you could before Williams got back to McKnight, weren't you?

A. Yes, sir.

Q. Well, let me ask you this: In all your getting, Mr. Williams has never admitted he took this girl's life, has he?

A. No, sir [T. T. pp. 262-264].

* * *

REDIRECT EXAMINATION

BY MR. HANRAHAN:

Q. Captain, when Mr. McKnight was in your office on the morning of the 26th of December, what conversation did you hear from him when he was on the telephone?

A. Well, I heard him say that, "You have to tell the officers where the body is," and he repeated a second time, "You have got to tell them where she is." He then said, "It makes no difference, you have got to tell them, you have already been on national hook-up." He said, "What do I mean by national hook-up? I mean you have been on television nationally, so that makes no difference. You have got to tell them where she is."

He then said, "It makes no difference anyway. When you get back here, you tell me and I'll tell them. I'm going to tell them the whole story." And he then turned to me and said, "He's afraid somebody's going to hit him in the head." And I said, "Well, Mr. McKnight, if you would like, I'll go after the man myself personally." And he said, yes, he'd like that. And he then talked back on the phone and he said, "Mr. Leaming is coming after you," and he said, "I know this man personally, he's a fine man and he won't let any harm come to you." That's about the size of it.

Mr. Hanrahan: That's all.

RECROSS EXAMINATION

BY MR. McKNIGHT:

Q. Say, Officer, that's interesting. Now you know we didn't know whether the girl was dead or alive when you left here, did we?

A. You told me she was dead.

Q. You want to say that I told you that?

A. Yes, sir. You said that Williams told you that.

Q. When did I say that?

A. Right there in my office in front of Chief Nichols. You said he said she was dead when he left the YMCA with her [T. T. pp. 265-266].

* * *

ARTHUR W. NELSON,

called as a witness on behalf of the plaintiff, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. HANRAHAN:

Q. Would you state your name and address, sir.

A. Arthur W. Nelson, 3021 E. 8th Street, Des Moines, Iowa.

Q. What is your occupation or profession, Mr. Nelson?

A. Detective, Police Department, Des Moines, Iowa.

Q. How long have you been on the Des Moines Police Department?

A. Over fifteen years.

Q. You were on the Des Moines Police Department on December 24th, 25th, 26th, 1968?

A. I was.

Q. And in what capacity do you serve on the police department?

A. Detective in the Robbery and Homicide Division of the Detective Bureau.

Q. On December 25th, 1968, did you make a trip to Davenport, Iowa?

A. I did [T. T. p. 269].

* * *

Q. Did you again go to Davenport on December 26th, 1968?

A. Yes, I did.

Q. And with whom did you go at that time?

A. That was Captain Leaming and myself.

Q. What time did you leave Des Moines for Davenport?

A. Shortly after 9, a. m., approximately 9:15, a.m.

Q. What time did you arrive in Davenport?

A. Sometime before noon, between 11:30 and 12.

Q. Whereabouts in Davenport did you go when you got there?

A. Directly to the police department.

Q. And what did you do at that time at the police station?

A. We talked to Lieutenant Ackerman who was in charge of the Detective Bureau at that time [T. T. pp. 270, 271].

* * *

Q. I see. Now how long was it before you left Davenport?

A. We left Davenport just about on the hour of 2:00, 2, p.m.

Q. Did you observe the defendant Williams having any conference with Attorney Tom Kelly?

A. Yes, I did. I observed the two in the room by themselves or going into the room, twice.

Q. This is between the time you returned after lunch—

A. Between 1 and 2, yes, sir.

Q. Did you drive the car down to Davenport?

A. No; Captain Leaming drove down. I drove back.

Q. All right. After you left the police station, did you go down to your car?

A. Yes, went directly out to the car.

Q. Who went to the car?

A. Captain Leaming, myself, Mr. Williams, Mr. Kelly and several of the Davenport policemen. I couldn't tell you exactly which ones.

Q. When you got in the car, who got in the back seat?

A. Captain Leaming and Mr. Williams.

Q. And you got in the driver's seat?

A. Yes.

Q. Just the three of you in the car?

A. Yes.

Q. Did you leave the area immediately?

A. Yes.

Q. Where did you go from the police station?

A. Went north out of town. I can't tell you the streets. I'm not that familiar with them. But we went north out toward the interstate highway and before we got to the interstate we stopped for gasoline at the filling station.

Q. After you gassed up, did you go directly to the interstate?

A. Yes [T. T. pp. 272, 273].

* * *

Q. Now as you proceeded west on the interstate toward Des Moines, did you have any conversation with the defendant Williams?

A. Very little conversation.

Q. Did you hear any conversation between the defendant Williams and Captain Leaming?

A. Yes, I did [T. T. p. 274].

* * *

Q. State whether or not you heard any conversation between Captain Leaming and the defendant Williams regarding Pamela Powers' boots and shoes.

A. Mr. Williams brought the subject up, he stated—this was before we got to Grinnell, he asked if we had found her boots and Captain Leaming stated that there had been some clothing and articles found in a rest area west of Grinnell, but that we did not know what was included in these articles found. We did not have time to look at the reports and so forth before we left, and we didn't know whether there was boots included in these articles or not. And I stated that Detective Speck had gone after these

articles and I hadn't had a chance to talk to him either, so I couldn't say whether there was boots found or not.

And we asked Williams if the boots were with the other articles and he stated no, they were behind a filling station, he believed to be a Skelly filling station on the exit or just off the exit to Grinnell.

Q. Where were you from this Grinnell exit at that time, Mr. Nelson?

A. I would say we were between Iowa City and Grinnell at this time. I couldn't say exactly the location, but—

Q. You had not yet—

A. We hadn't come to Grinnell. We were quite a ways away yet at that time.

Q. What if anything did you do when you reached the Grinnell turn-off?

A. Well, before we got to the Grinnell turn-off, I asked Mr. Williams if it was to the exit toward the north, toward Grinnell, and he stated it was, so I took that exit. And there is two filling stations, one on the right-hand side of the road or the east, and one on the west, and I asked if it was one of those filling stations, and he stated, yes, it was the filling station on the east side of the road [T. T. pp. 276, 277].

* * *

Q. Did you go to this service station?

A. Yes, we did. I drove up toward the side and asked him where the boots would be if they were there, and he stated, well, it's on around in back. There is a restaurant attached to the filling station, and he stated that it would be—they would be behind the restaurant part of the building. And he stated that there were a bunch of discarded boxes and so forth back there and he put the boots in one of these boxes.

Q. Did you drive him around the back of the service station?

A. Yes, I did. And he pointed to the proximity of where the boots should have been. I got out of the car and looked around but couldn't find the boots, or no boxes either [T. T. p. 278].

* * *

Q. Then was there any more conversation after you got back on the interstate?

A. Well, even before we stopped at the Skelly station we had conversation with the subject in reference to this other found property at the rest area, and at that time he asked if we had found the blanket. And again Captain Leaming nor myself knew just what had been found, so we were not familiar with what was found, so we didn't know whether a blanket was included or not in the property found. And he stated that he had put the blanket along with the clothing and so forth in the men's room of the rest area. He stated that the clothing he had put in the paper towel receptacle, but the blanket was too big, so he threw it up over one of the partitions there in the restroom.

Q. Did you go to the rest area then?

A. Yes, I did [T. T. pp. 280, 281].

* * *

Q. Did you find the blanket there at that time?

A. No, I did not.

Q. Did you proceed on from the rest area then?

A. Yes, I had to go back to the Grinnell exit to get back on the eastbound lane [T. T. p. 282].

* * *

Q. Now was there any further conversation about this matter, Pamela Powers matter?

A. Not too much conversation about that. There was conversation in the rear seat between Captain Leaming and Mr. Williams. Much of the conversation I couldn't understand. Mr. Williams spoke so low that part of his conversation I couldn't make out, but I did hear him state before we got to the Mitchellville interchange that he would show us the body.

Q. Did he tell you where to go to find the body?

A. Yes, he did. He stated that the body was approximately two miles away from Mitchellville, and he stated after he got off of the interstate going to Mitchellville, that he went away from town. So when he stated away from town or away from Mitchell-

ville, I presumed that he meant north away from town, and as I left the interstate, got on the exit, I proceeded north.

Q. That would be up this way?

A. Right. I no sooner started north on that road when Mr. Williams wanted to know where I was going, and I stated, "Well, you said you had gone away from town where you disposed of the body," and he says, "Well, this is not the way." He stated, "It's back the other way." He said, "Where is the filling station?" And the filling station was back toward Mitchellville on the south side of the interstate, and so we proceeded to turn around, and after we got by the DX station—I'll show you, this would be the station here, this is where it was. We went up this way, come back here and there was a DX station right here, and he stated to go to the first road and drive back west approximately a mile, mile and half, and that's where the body would be on the north side of the road, in the ditch.

Q. And did you go back west on this first road?

A. Yes, we did. We searched with the assistance of the State Bureau of Investigation and one highway patrol car. And after looking for a matter of ten or fifteen minutes in that area, he stated that it was possible that this was not the road, it may have been a road further south [T. T. pp. 282-284].

* * *

Q. Now what did you do when you got down here on this east-west road in the south?

A. We proceeded west to where we had passed a farm house that Mr. Williams stated it was on the south side of the road, and he stated that looked like the area, looked like the house. He stated there should be another farm house on further west on the north side of the road, and it was right between these two farm houses.

After we passed this farm house on the south side of the road, he stated that—or correction, Jack Wissler in the highway patrol car was stopped up ahead, and he stated that this was the proximity of the body and, in fact, he stated, "Well, he must have found it," because he had his spotlight into the ditch on the north side of the road. But as we got closer to the highway patrolman, he started up and as we met him, we asked him if he had seen anything, and he said no. And we said, well, Williams stated that he was about at the right spot. And we returned to this spot, and the highway patrolman and the state agents got out and started looking along the ditch. And after they had looked a little while and hadn't found anything, why, Mr. Williams stated, "Well, I might be mistaken again. It might be up further," and I was just getting ready to pull on up going further west when the other men hollered that they had found it and flashed their light on it.

Q. Did you get out of the car, Mr. Nelson?

A. Yes, I did.

Q. And did you observe the body of Pamela Powers at the scene?

A. Yes, I did [T. T. pp. 285, 286].

* * *

CROSS-EXAMINATION

BY MR. McKNIGHT:

* * *

Q. Does this sound sort of strange to you that Williams was asking most of the questions?

A. Oh, not the type of questions he was asking.

Q. That isn't the way a detective works, they usually ask the questions, don't they?

A. For interrogating someone, yeah.

Q. You all were trying to find out about this child, weren't you?

A. We weren't interrogating him.

Q. Oh, you weren't interrogating?

A. No.

Q. So everything you testified to, Williams just started talking?

A. He did a lot of talking, yes, sir.

Q. Without anybody asking him anything?

A. Yes, other than I told you, first when we left Davenport, Captain Leaming asked him to think about telling us where the body is.

Q. So then how far did you ride while he was in there thinking about is?

A. He didn't tell us that he was going to tell us about the body between Grinnell and Mitchellville, but he done other talking between.

Q. So Captain Leaming evidently said to think about it right after you got on the interstate?

A. Yes.

Q. That's one hundred sixty-seven miles from Des Moines?

A. Yes.

Q. Grinnell is how far from Des Moines?

A. I suppose fifty, sixty miles, fifty, fifty-five [T. T. pp. 289, 290].

* * *

Q. Didn't Captain Leaming say to this defendant, you are the only person that knows whether this girl is dead or alive and where the body is?

A. I don't know that he asked that, no. He may have said that you are the one that could tell us where it is.

Q. Well, now, Williams wasn't talking then, was he?

A. He was talking most of the time. Like I stated, he did a lot of talking [T. T. p. 291].

* * *

Q. Well, now, didn't Captain Leaming say, I know the body is in the Mitchellville area?

A. He did make that statement, not that he knew, that he presumed the body was in the area, Mitchellville area, yes, sir [T. T. p. 292].

* * *

THOMAS M. KELLY, JR.,

called as a witness on behalf of the defendant, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. McKNIGHT:

Q. Would you state your full name.

A. Thomas M. Kelly, Jr.

Q. Where do you live, Mr. Kelly?

A. 758 Knoxville Road, Milan, Illinois.

Q. What is your business or occupation?

A. I'm an attorney.

Q. And where is your office?

A. 210 Main Street, Room 200 Kresge Building, Davenport, Iowa.

Q. How long have you been an attorney, Mr. Kelly?

A. Since '52. I've been in Davenport since 19 — April of 1958.

Q. Now Mr. Kelly, I'll ask you whether or not you were in Davenport on December 26, 1968?

A. I was.

Q. I'll ask you whether or not you became acquainted with a man you now know as Robert Anthony Williams?

A. I did.

Q. Do you see Mr. Williams in the courtroom?

A. Yes, I do.

Q. Where do you see him?

A. He's seated directly behind you.

Mr. McKnight: Let the record show that the witness has identified defendant Williams.

Q. Where did you see Mr. Williams?

A. First time I saw Mr. Williams was in the courtroom of the Municipal Court of the City of Davenport.

Q. Now let's backtrack, had you had any conversation by telephone or otherwise with me prior to the time you saw Mr. Williams?

A. No, I did not.

Q. Now what if anything was Mr. Williams doing when you saw him?

A. He was before the Honorable Judge Bertram B. Metcalf who was advising him of his rights. Present in the courtroom was Lieutenant Ackerman and another Davenport detective. I was standing beyond the bar, so to speak.

Q. Did you see Mr. Williams do anything or say anything with reference to you?

A. Mr. Williams asked the Judge if I was a lawyer and the Judge informed him that I was, and he asked me if I would talk to him which I agreed to do.

Q. Where did you go for this?

A. From there we left the courtroom, Mr. Williams was in the custody of Lieutenant Ackerman. We went back to the Davenport Detective Bureau and there we went into one of the rooms that they use to question suspects [T. T. pp. 347-349].

• • •

Q. About how long did the conversation last?

A. First conversation I had with him lasted about forty minutes [T. T. p. 349].

• • •

Q. All right. Then did you go to lunch?

A. They left. Then I left. And then I came back about 1:15 or so in the afternoon to the Davenport Detective Bureau.

Q. Did you see Mr. Leaming when you came back?

A. Yes, he was present, and the sergeant was present.

Q. Then what if anything took place?

A. Mr. Williams wanted to talk to—I was given the impression at first that Mr. Williams wanted to talk to me and Lieutenant Ackerman of the Davenport Detective Bureau, and it later developed that he only wanted to talk to me.

Q. Did you talk to him?

A. I talked to him again, I'd say, for about, oh, fifty or sixty minutes, an hour.

Q. And then what if anything did Leaming say when the conversation was over?

A. Well, I came out of the—again one of these small rooms, and I—Leaming had knocked on the door and said he was ready to travel, and then we had a discussion about an agreement that Leaming had between you and he.

Q. You had that conversation with Mr. Leaming?

A. That's right. I had a discussion with him earlier that morning about that, prior to the time that he went to lunch.

Q. What did Leaming say to you?

A. Well, I told him that it was my understanding that Mr. Williams was to be returned to the city of Des Moines and after his return to the city of Des Moines that you would talk to Williams in Leaming's office, and at that time he would reveal where the body was.

Q. Did you say body or the child?

A. Well, he said child and then he said body. I mean, this is what Leaming said to me. I might be interposing some words here that are not exactly the exact conversation, but this is the general context of it.

Q. Now what did Leaming say to that?

A. The last conversation I had with him, he said, well, "This isn't quite the way I understand it." And I said, "Well, this is the way I understand it." And I said, "I think it should be followed through, it should be carried out," and then we decided we'd have to get him out of there and we still had all these newsmen around, so I suggested an escape route to avoid the photographers. It was along about this same time that I offered the captain, I said, "I'll ride back to Des Moines with him to

make sure his rights are protected."

Q. What Captain Leaming say to that?

A. He said I could not ride in a Des Moines police car.

Q. Then what did Leaming say?

A. So then I said to him, jokingly, I said, "Maybe I should follow you in my car."

Q. What did he say to that?

A. He didn't like the idea. At least I got the impression that he didn't like the idea [T. T. pp. 350-352].

* * *

WENDELL NICHOLS,

called as a witness on behalf of the defendant, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. McKNIGHT:

* * *

Q. Now did you hear any statement that I made to Leaming in that office that the child is dead?

A. Yes, I did [T. T. p. 358].

* * *

Q. Yes, are you saying that I said that?

A. All I can say is this, Mr. McKnight, prior to the telephone call coming to Des Moines, I remember that and I thought this was speculation on your part. I think we all speculated as to what happened, and you made the statement that she was dead when she left the hotel. I know that. And at that point I became quite emotional.

Q. I said we all said she was probably dead when she left the hotel. We all thought that. Isn't that what was said?

A. The statement you made was, "I figured she was dead. I know she's dead." And I think at that point that conversation was not limited to you. I'm sure I may have said the same thing.

Speculating.

Q. We were just speculating?

A. I think this was probably—

Q. You didn't hear me tell anybody that Williams told me this girl was dead, did you?

A. I don't recall that you actually said Williams said this. But I know that you did say that you had talked to Williams prior to this [T. T. pp. 358-359].

* * *

On May 13, 1969, the following Motion for New Trial was filed in the District Court of the State of Iowa, in and for Polk County:

COMES NOW the Defendant and for his Motion for a new trial states and shows to the Court as follows:

1. That the court was in error in overruling the Defendant's Motion to Suppress the evidence, which ruling was duly made after formal hearing on April 2, 1969, but the ruling was not filed with the court's findings until May 6, 1969 for the reason that the court specifically found that there was an agreement between counsel and the police officials to the effect that the Defendant was not to be questioned on the return trip to Des Moines and that he would talk to police officials with his attorney on arrival in Des Moines; that the findings of the court are in keeping with the facts, but the application of the law to the facts, the Defendant feels that the court was in error and that said evidence should have been suppressed.

2. That the court was in error in its ruling on the admissibility of the evidence given by each and every witness concerning the statements, admissions and demonstrations made by the Defendant on the return trip from Davenport to Des Moines, Iowa on December 26, 1968 for the reason that said admissions, demonstrations and confession were taken from the Defendant in violation of his constitutional rights, which are guaranteed to him under the Fifth Amendment to the Constitution of the United States and the Sixth Amendment to the Constitution of the United States in that the Defendant is compelled to produce evidence against himself and that he was effectively denied assistance of counsel, which is also guaranteed to the Defendant as to due process of law under the

State Constitution, Article One, Section Nine, and as to assistance of counsel, Article One, Section Ten of the Iowa Constitution.

* * *

8. That the Court was in error in giving Instruction No. 9 for the reason that the court failed to give in its instruction that the state was required to prove beyond a reasonable doubt that at the time of such alleged acts and statements, the Defendant was informed of, understood and thereafter knowingly waived such rights, and the Court left it to the jury to conclude, and the jury might have concluded that the State was only required to prove by the preponderance of the evidence that the Defendant knowingly waived his rights; that in giving such instruction, it was erroneous and misleading.

WHEREFORE, Defendant prays that the Court grant a new trial in the above entitled matter for all of the reasons set out herein.

/s/ Henry T. McKnight
HENRY T. McKNIGHT
Attorney for Defendant
506 East Walnut Street
Des Moines, Iowa 50309
243-5293

CERTIFICATE OF SERVICE

I, Richard N. Winders, Assistant Attorney General for the State of Iowa, hereby certify that on this 18th day of February, 1976, three (3) copies of the Appendix were mailed, correct postage prepaid, to:

Mr. Robert Bartels
University of Colorado
Fleming Law Building
Boulder, Colorado 80302

I further certify that all parties required to be served have been served.

RICHARD N. WINDERS
Assistant Attorney General
State Capitol
Des Moines, Iowa 50319
Attorney for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1263

LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,
Petitioner,

vs.

ROBERT ANTHONY WILLIAMS, a/k/a ANTHONY ERTHEL WILLIAMS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX

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In the Supreme Court of the United States

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LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX

Pursuant to Supreme Court Rule 23(i), the opinion and order of the United States District Court for the Southern District of Iowa, referred to in Appendix B, is set out in its entirety.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 72-257-2

ROBERT ANTHONY WILLIAMS a/k/a
ANTHONY ERTHEL WILLIAMS,
Petitioner,

v.

LOU V. BREWER, Warden of the Iowa State
Penitentiary at Fort Madison, Iowa,
Defendant.

MEMORANDUM AND ORDER

I

The Court issues this Order pursuant to the Petition for Writ of Habeas Corpus filed by Robert Anthony Williams challenging his May 6, 1969 conviction of murder (§690.2, Code of Iowa 1966) in the District Court of Iowa in and for Polk County, Criminal No. 55805. The issues which Petitioner now is presenting to this Court were timely raised at the trial court level and on appeal to the Supreme Court of Iowa; the latter Court affirmed Petitioner's conviction in *State* v. *Williams*, 182 N.W.2d 396 (1971). Thus, there is no question that Petitioner has exhausted his available state remedies as required by 28 U.S.C. §2254.

II

The central issue raised by Petitioner at trial, on appeal to the Supreme Court of Iowa, and in this Court, is whether certain statements made by Petitioner to a Des Moines police officer, Detective Leaming, during an automobile trip from Davenport, Iowa, to Des Moines, Iowa—and other evidence and testimony obtained as a result of those statements—were properly admitted into evidence under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. In this Court, the attorneys for the State of Iowa and for the Petitioner agreed that the case would be submitted on the record of facts and proceedings in the trial court, without taking of further testimony. Based on its examination of that record, the Court makes the following findings of fact relative to the issues raised herein.

1. On December 24, 1968, a family by the name of Powers attended a wrestling tournament in the YMCA building in Des Moines, Iowa. When Pamela Powers, aged ten, failed to return from a trip to the restroom, a search was instituted, but she could not be found. YMCA personnel subsequently called the police. 182 N.W.2d at 399.

2. Suspicion rather quickly was focused on the Petitioner, who had left the YMCA in his automobile shortly after Pamela Powers' disappearance. On December 25, 1968, Petitioner's car was found in Davenport, Iowa, approximately 160 miles east of Des Moines, and a search was instituted for him in the Davenport area by the Davenport and Des Moines police and by the Iowa Bureau of Criminal Investigation. 182 N.W.2d at 399. At about this time, a warrant for Petitioner's arrest, on a charge of child-stealing, was issued and filed in Polk County. R. at 16, 108.

3. On the morning of December 26, 1968, Petitioner called his Des Moines attorney, Mr. Henry McKnight, from Rock Island, Illinois. Mr. McKnight advised Petitioner to surrender himself to the Davenport police. 182 N.W.2d at 406; R. at 67.

4. At approximately 8:40 a.m. on December 26, 1968, Petitioner did surrender himself to the Davenport police. He was placed under arrest and booked by the Davenport police. At 11:00 a.m. on the same day, Petitioner was arraigned before a state court judge in Davenport as a fugitive to be held on the Polk County warrant, and notified of the charges against him. R. at 16-17.

5. Following his telephone conversation with Petitioner on December 26, 1968, Mr. McKnight proceeded to the Des Moines Police Department, where he talked to various officials, including Detective Leaming, about the Petitioner's proposed surrender and his subsequent transportation to Des Moines. 182 N.W.2d at 399, 406; R. at 10, 25, 128-29. While Mr. McKnight was at the Des Moines Police Department, he received a long distance telephone call from Petitioner, who at that time was in custody in Davenport. Mr. McKnight told Petitioner that he would be picked up in Davenport, that he would not be mistreated or grilled, that they would talk it over in Des Moines, and that Petitioner should make no statement until he reached Des Moines. 182 N.W.2d [sic] at 399, 406; R. at 11, 21, 67. Mr. McKnight's portion of this conversation was carried on in the presence of Chief of Police Wendell Nichols and Detective Leaming. 182 N.W.2d at 406; R. at 11, 25, 116, 130.

6. As a result of these conversations, it was agreed that Detective Leaming would go to Davenport to pick up Petitioner, without Mr. McKnight, and bring him directly

back to Des Moines. R. at 11, 131. At this time there also was an agreement between Mr. McKnight and the police that the Petitioner would not be questioned until after he had returned to Des Moines and consulted with Mr. McKnight. R. at 34.

7. On December 26, 1968, Detective Leaming drove from Des Moines to Davenport to pick up the Petitioner; Detective Leaming was accompanied by Detective Arthur Nelson. 182 N.W.2d at 399; R. at 113.

8. While he was in Davenport, the Petitioner consulted with a local attorney, Mr. Thomas Kelly, about his situation. Petitioner had asked to talk with Mr. Kelly, and their conversations were carried on in the context of an attorney-client relationship. While Petitioner was in Davenport, Mr. Kelly in effect acted as his attorney. R. at 109-110, 67-68, 180-184. Mr. Kelley advised Petitioner to remain silent until he got to Des Moines and talked with Mr. McKnight. 182 N.W.2d at 406; R. at 23-24.

9. Detectives Leaming and Nelson arrived in Davenport at about noon on December 26. After meeting Mr. Kelly and being informed that Petitioner was eating lunch, Leaming and Nelson went to lunch. When they returned at approximately 1:00 p.m., they had some conversation with Mr. Kelly and Petitioner. At this time Detective Leaming gave Petitioner his *Miranda* warnings; these warnings were not repeated during the trip to Des Moines. When Detective Leaming gave these *Miranda* warnings, he told Petitioner that they would be "visiting" during the trip to Des Moines. 182 N.W.2d at 406; R. at 26, 114.

10. After the *Miranda* warnings referred to in the preceding paragraph were given, Petitioner again conferred privately with Mr. Kelly, whom Detective Leaming understood to be acting as Petitioner's attorney (in addi-

tion to Mr. McKnight). R. at 26-27, 114-115. After this conference, Mr. Kelly again spoke with Detective Leaming. Mr. Kelly told Detective Leaming that it was his understanding that Petitioner was not to be questioned until he got to Des Moines; when Detective Leaming expressed some reservations, Mr. Kelly stated that that understanding should be carried out. R. at 21, 182-83.

11. Before Detective Leaming left for Des Moines with the Petitioner, Mr. Kelly asked Detective Leaming that he be permitted to ride along in the police car to Des Moines. This request was refused by Detective Leaming. 182 N.W.2d at 406; R. at 183.

12. On several occasions during the trip to Des Moines, and after the aforementioned *Miranda* warnings were given in Davenport, Petitioner told Detective Leaming that he would talk to him after he returned to Des Moines and consulted with his attorney, Mr. McKnight. 182 N.W.2d at 406; R. pp. 27-28, 30, 33. The *Miranda* warnings were never repeated during the trip itself. R. at 133.

13. The Petitioner had been a patient at the State Mental Hospital at Fulton, Missouri for three years prior to his escape on July 6, 1968. Petitioner also was a person of a deeply religious nature. These facts were known to the Des Moines police, including Detective Leaming, at the time the Petitioner returned to Des Moines from Davenport with Detective Leaming. 182 N.W.2d at 406; R. at 67, 119, 133, 148.

14. Following the giving of *Miranda* warnings by Detective Leaming, Petitioner did not state that he wished to waive his *Miranda* rights. In fact, as noted in Paragraph 12, supra, Petitioner indicated that he did not wish to talk on the trip by stating that he would talk after he got to Des Moines and spoke with Mr. McKnight. Nevertheless,

while Detective Nelson drove, Detective Leaming carried on a conversation with Petitioner during the trip concerning religion, Petitioner's reputation, and various other topics, including Petitioner's friends, Petitioner's Reverend, a Mr. Searcy, whether the police had checked for fingerprints in Petitioner's room, the intelligence of other people, police procedures, organizing youth groups, singing, playing a piano, playing an organ, "and this sort of thing." 182 N.W.2d at 406-407; R. at 19. At about this time, Detective Leaming also testified that he told Petitioner that he did not hate him or wish to kill him; that "I myself had had religious training and background as a child, and that I would probably come more near praying for him than I would to abuse him or strike him"; and that he was a good police officer and would protect Petitioner and not allow anyone to molest or abuse him. R. at 118-19; T. at 222.

15. According to Detective Leaming's own testimony, the specific purpose of this conversation was to obtain statements and information from the Petitioner concerning the missing girl. In this regard, the following testimony by Detective Leaming on cross-examination during pretrial proceedings in the Polk County District Court is particularly relevant:

> Q. Now, when you left, just before you left, do you remember we had parted greetings and didn't you say, 'I'll go get him and bring him right back here to Des Moines'? A. Yes, sir.
> Q. You said that to me, didn't you? A. Yes, sir.
> Q. Knowing that you were dealing with a person from a mental hospital, did you say to him, you don't have to tell me this information, did you say that to him out there on the highway? A. What information?

> Q. The information that he gave you, the defendant gave you, you didn't say that to him, did you? A. No, sir.
> Q. In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren't you? A. I was sure hoping to find out where that little girl was, yes, sir.
>
> * * *
>
> Q. Well, I'll put it this way: You were hoping to get all the information you could before Williams got back to McKnight, weren't you? A. Yes, sir.
> R. at 136-37. *See also,* R. at 133-34, 135.

16. Detective Leaming specifically appealed to Petitioner's known religious nature in order to obtain statements from him concerning the whereabouts of the missing girl. The following testimony by Detective Leaming himself, describing what he said to the Petitioner, clearly sets out the approach which he used:

> Eventually, as we were traveling along there, I said to Mr. Williams that, 'I want to give you something to think about while we're traveling down the road.' I said, 'Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be en-

titled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.' R. at 120.

17. Following this statement, Petitioner asked why Detective Leaming felt that they were going past the body, and Detective Leaming told Petitioner that he knew the body was somewhere in the area of Mitchellville, a town near Interstate 80. Detective Leaming then stated, "I do not want you to answer me. I don't want to discuss it further. Just think about it as we're riding down the road." R. at 120-21.

18. In fact, Detective Leaming did not know that the body was near Mitchellville, and he made the statement to Petitioner specifically to induce Petitioner to tell him where the body was. R. at 135.

19. At some point east of Grinnell, Iowa, and after the conversation outlined in Paragraphs 14 and 17, *supra*, Petitioner asked if the police had found the victim's shoes. Without any further constitutional warnings, Detective Leaming discussed with Petitioner what evidence had been found, where Petitioner had put the shoes, and what the shoes looked like. A stop at a gas station where the shoes were supposed to be produced no results. 182 N.W.2d at 404; R. at 121-22.

20. Following this incident, there was some further discussion of a blanket; a stop at a rest area disclosed that the blanket already had been found. 182 N.W.2d at 404; R. at 122-23.

21. After the stop at the rest area, there was further discussion about "people and religion and intelligence and

friends of [Petitioner's], and what people's opinion was of him and so forth." Then, "some distance still east of the Mitchellville turnoff," Petitioner stated that he would show the detectives where the body was. 182 N.W.2d at 404, 407; R. at 123.

22. Following Petitioner's statement, the police, including Detective Leaming, drove to a place indicated by Petitioner, where they located the body of Pamela Powers. 182 N.W.2d at 404; R. at 124-25, 145-47.

23. Although Detective Leaming's automobile was not equipped with a radio capable of reaching Des Moines during most of the trip, a state car which was following at all times was equipped with such a radio. This radio was in fact utilized to keep in touch with Chief Nichols. Chief Nichols was informed of the side trip to Mitchellville, but did not relay this information to Mr. McKnight. R. at 12-13, 150 (11. 20-23).

24. As noted above, Petitioner's statements of December 26, 1968, to Detective Leaming were admitted into evidence at Petitioner's trial, along with other evidence obtained pursuant to these statements, all over Petitioner's objections. 182 N.W.2d at 398-99.

Most of the facts found above are not disputed by either party. Specifically, there has been no dispute about the facts set out in Paragraphs 1 through 5, 7 through 9, and 12 through 24, *supra*. However, there was some dispute in the record, at oral argument, and in the briefs over some of the facts in the remaining Paragraphs (6, 10 and 11), and the Court deems it appropriate at this point to set out briefly how it resolved these disputes.

First, the State disputed whether an agreement was entered into by Detective Leaming with Petitioner's attorney that the Petitioner would not be questioned by the

police on the return trip from Davenport (see Paragraph 6, *supra*). However, the Court finds this dispute easily resolved in light of the trial court's specific finding of fact that such an agreement did exist, and in light of that same Court's explicit doubts as to the testimony of Detective Leaming.[1]

Second, the State disputed whether Mr. Kelly, after conferring with Petitioner on an attorney-client basis, requested permission to ride to Des Moines with Petitioner and Detective Leaming (Paragraph 11, *supra*). Detective Leaming denied that there was such a request; both Petitioner and Mr. Kelly, who was a duly licensed member of the bar of Iowa, testified that there was. In light of Petitioner's obvious self-interest in the matter, the Court has discounted for the most part his testimony on this point. The Court has carefully reviewed the transcript of the testimony of Attorney Kelly and Detective Leaming. Taking the record of all the testimony in this case as a whole, the Court must reconcile discrepancies between the testimony of Detective Leaming and Mr. Kelly in favor of the Petitioner, and the Court so finds that there was a request by Mr. Kelly to accompany the Petitioner to Des Moines.[2] The Court has also resolved in Petitioner's favor the conflict in the record over whether Mr. Kelly told Detective Leaming that Petitioner was not to talk until after he reached Des Moines (see Paragraph 10, *supra*).

None of the preceding findings of fact conflicts with any of the factual findings made by the state trial court. The question remaining is whether the state courts cor-

1. This finding by the trial court is amply supported by the testimony of Wendell Nichols, Chief of Police of Des Moines, and by the cross-examination of Detective Leaming.

2. The state court made no findings of fact on this issue apparently because it regarded it as irrelevant to the admissibility of the challenged evidence.

rectly applied the law to the facts in permitting the challenged evidence to be admitted. The conclusion of this Court is that the evidence was improperly admitted and that Petitioner's request for release must be granted.

III

On the basis of the facts outlined above, Petitioner argues that both his Fifth and Sixth Amendment rights were violated when the statements described above were elicited from him during the Davenport-Des Moines trip with Detective Leaming and Nelson. The Court begins with the Sixth Amendment argument.

Petitioner centers his claim of Sixth and Fourteenth Amendment violations around the case of *Massiah* v. *United States,* 377 U.S. 201 (1964). In *Massiah,* the defendant had been indicted and was represented by counsel. In order to obtain incriminating statements from the defendant, the police arranged for an alleged accomplice of the defendant to meet with the defendant in the accomplice's car; the car was equipped with a radio transmitter which enabled a government agent to hear incriminating statements made by the defendant to the alleged accomplice; these statements were introduced at trial over the defendant's objections. The United States Supreme Court reversed the defendant's conviction, holding that the defendant's right to counsel under the Sixth Amendment had been violated when the government agents obtained his statements through deception and in the absence of counsel.

The *Massiah* opinion left open the question of the stages to which the Sixth Amendment right to counsel attaches. The Respondent has not challenged Petitioner's assertion that the automobile trip in question in this case was such a stage; nevertheless, some preliminary attention

to this point is appropriate. In *Kirby* v. *Illinois*, 406 U.S. 682 (1972), the Supreme Court held that a Sixth Amendment right to counsel at a line-up exists only after "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, or arraignment." 406 U.S. at 686. Petitioner has suggested a large number of factors indicating the initiation of "adversary judicial criminal proceedings" prior to the automobile trip in question. Although the Court cannot agree with all of them, three factors do show conclusively that the *Kirby* test was met in this case: (1) an arrest warrant for Petitioner, charging him with child-stealing had been issued in Polk County; (2) Petitioner was arrested on the warrant and booked in Davenport; and (3) Petitioner was arraigned in Davenport on the Polk County warrant.

Since the submission of this case, the Supreme Court has decided another case which further supports the conclusion that the Sixth Amendment guarantees outlined in *Massiah* apply to the instant situation. In *United States* v. *Ash*, 413 U.S. 300 (1973), the Supreme Court held that a pretrial event is a "critical stage" at which the accused has a right to counsel when the accused requires aid in coping with legal problems *or* help in meeting his adversary in a confrontation-type situation. The Court explicitly held *Massiah* as falling within this analysis, because in that case "the accused was confronted by prosecuting authorities who obtained by ruse and in the absence of defense counsel, incriminating statements." 413 U.S. at 311. Clearly, in this case also, Petitioner was protected by the right of counsel during the trip from Davenport to Des Moines.

This leaves the question of whether Petitioner's right to counsel was violated during that trip, the answer clearly is in the affirmative. Like the defendant in *Massiah*, Petitioner not only had a right to counsel during the time in question, he actually had arranged for counsel. As in *Massiah*, the authorities used a ruse to obtain statements from the defendant in the absence of counsel: Detective Leaming obtained statements from Petitioner in the absence of counsel (1) after making, and then breaking, an agreement with Mr. McKnight that Petitioner would not be questioned until he arrived in Des Moines and saw Mr. McKnight; (2) after being told by both Mr. McKnight and Mr. Kelly that Petitioner was not to be questioned until he reached Des Moines; (3) after refusing to allow Mr. Kelly, whom Detective Leaming himself regarded as Petitioner's co-counsel, to ride to Des Moines with Petitioner; and (4) after being told by Petitioner that he would talk *after* he reached Des Moines and Mr. McKnight. By violating or ignoring these several, clear indications that Petitioner was to have counsel during interrogation, Detective Leaming deprived Petitioner of his right to counsel in a way similar to, if not more objectionable than, that utilized against the defendant in *Massiah*.[3]

Respondent, and Detective Leaming in his testimony in the state court record, have argued that Detective Leaming's "conversations" with Petitioner did not amount to "interrogation," apparently because Detective Leaming's initial statements to Petitioner did not end with a question mark. However, quite apart from the fact that Detective Leaming clearly did ask many questions of Petitioner concerning the whereabouts of the body (in the absence either of counsel or any mention by Detective Leaming of the availability of counsel), Detective Leaming's initial "state-

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3. Recently the Eighth Circuit Court of Appeals in *United States* v. *Stabler*, 490 F.2d 345, 350 (1974), stated that a defendant's spontaneous confession was admissible. That case must be distinguished as completely inapposite to the present case, given the mental coercion and promptings of Detective Leaming after the Petitioner had been isolated from his attorneys.

ments" to Petitioner concerning the weather, the desirability of a Christian burial for the victim, and Detective Leaming's "knowledge" that the body was near Mitchellville clearly amounted to interrogation. The statements explicitly encouraged incriminating responses, and by Detective Leaming's own admission, they specifically were *intended* to produce such responses. The "statements" by Detective Leaming were as much interrogation as the methods used in *Massiah*, and to hold them to be anything less would be to reach an absurd result purely on the basis of punctuation.

Although the *Massiah* decision adequately covers the Sixth Amendment issue in this case, the Court notes that at least two Circuit Courts of Appeal have found Sixth Amendment violations in similar situations in which government authorities have ignored demands by counsel that interrogation take place only in their presence. In *United States ex rel. Magoon* v. *Reincke*, 304 F.Supp. 1014 (D. Conn. 1968), *affirmed*, 416 F.2d 69 (2d Cir. 1969), the defendant had been formally arrested and given *Miranda* warnings.

In a phone conversation, his attorney told the defendant's interrogators to cease interrogation until he arrived. This demand was ignored, and statements were obtained from the defendant in his counsel's absence. The District Court held that:

> [O]nce an attorney representing a suspected felon upon whom investigation has focused contacts the police officer in whose charge he is held and informs him that he does not want him interrogated further, to admit into evidence statements thereafter obtained from the accused by police interrogation in the absence of counsel violates the defendant's constitutional rights. 304 F.Supp. at 1019.

In *Taylor* v. *Elliot*, 458 F.2d 979 (5th Cir. 1972), *cert. denied*, 409 U.S. 884 (1972), police officers transporting the defendant from Dublin, Georgia to Birmingham, Alabama ignored the defendant's mother's statements, relaying advice from his attorney, that he was to make no statements until he arrived in Birmingham. The confession obtained by the officers during the trip was introduced into evidence at defendant's trial. The Court of Appeals reversed defendant's conviction, holding that the interrogation in the face of the officer's knowledge that defendant had counsel who was absent but who had instructed him not to make any statement violated the defendant's Sixth Amendment rights. 458 F.2d at 980. *See also, Clifton* v. *United States*, 341 F.2d 649 (5th Cir. 1965); *United States* v. *Wedra*, 343 F.Supp. 1183 (S.D. N.Y. 1972).

The above discussion has ignored one of the main thrusts of both the Respondent's argument and decisions of state courts in this case: that Petitioner waived his Sixth Amendment rights during the automobile trip in question. The Court's conclusion, more fully explicated in Section V, *infra*, that Petitioner clearly did not waive his Fifth or Sixth Amendment rights directly answers this argument. Moreover, given the factual context of this case, this Court is of the opinion that Petitioner could not effectively waive his right to counsel for purposes of interrogation in the absence of counsel (or at least notice to his counsel of the interrogation). See *McLeod* v. *Ohio*, 381 U.S. 356 (1965); *Mathies* v. *United States*, 374 F.2d 312 (D.C. Cir. 1967) (opinion by Burger, J.); *United States ex rel. Magoon* v. *Reincke, supra*; *Taylor* v. *Elliot, supra*; *United States ex rel. Chabonian* v. *Liek*, 366 F.Supp. 72 (E.D. Wisc. 1973); *United States* v. *Durham*, 475 F.2d 208 (7th Cir. 1973). When the police have agreed with the defendant's attorney that the defendant will not be questioned in the attorney's absence, when another

attorney has asked to be with the defendant at a particular time and place, and when the defendant has repeatedly asserted his desire not to talk in the absence of counsel, the police plainly should not be permitted to interrogate the defendant at all until further notice is given to his counsel. To hold otherwise would make it impossible for defense counsel fully to protect his client's rights without staying with him 24 hours a day. *See, United States* v. *Wedra, supra,* at 1184, 1186.

IV

We now turn to Petitioner's argument that the facts of this case show violations of the holdings in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1965). In *Escobedo*, police officers resisted efforts by both the defendant and his counsel to have counsel present during interrogation; statements obtained from the defendant in the absence of counsel were admitted into evidence at his trial. The Supreme Court reversed, holding that when a person is in custody and suspicion has focused on him, he has a right to have counsel present during interrogation.

Petitioner clearly was in custody and suspicion clearly had focused on him when the automobile trip in question occurred, and *Escobedo* therefore applies. From this point, the analysis is strikingly similar to the *Massiah* analysis set out earlier in this opinion. Detective Leaming's actions in breaking his agreement with Mr. McKnight that Petitioner would not be questioned during the Davenport-Des Moines trip, in refusing to allow Mr. Kelly to ride along, and in ignoring Petitioner's statements that he would talk *after* he reached Des Moines were aimed at preventing the presence of counsel when he first talked with Petitioner with the express purpose of obtaining incriminating

statements; this was a clear and direct violation of *Escobedo* holding.[4]

Petitioner also has argued that the elicitation of statements from him during the trip from Davenport to Des Moines violated the standards set out in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 12 L.Ed.2d 977 (1965). Petitioner does not seriously dispute that *Miranda* warnings were given to him, and this Court has found that these warnings were given by the Davenport police when Petitioner was placed under arrest, by the state court judge at the Davenport arraignment, and by Detective Leaming before the automobile trip began. Nevertheless, this Court is compelled to conclude that the standards set out in *Miranda* were violated by Detective Leaming's actions subsequent to the warnings.

The *Miranda* holding requires, as an initial matter, that before a person in custody is questioned by the police, he must be warned (1) that he has a right to remain silent; (2) that anything he says can be used against him in court; (3) that he has the right to the presence of an attorney; and (4) that if he cannot afford an attorney one will be appointed for him. But *Miranda* does not simply require these warnings and then permit interrogation to continue automatically. For example,

> [i]f the individual indicates *in any manner*, at any time prior to or during questioning, that he wishes to remain silent, the *interrogation must cease*. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. 384 U.S. at 473-74 (emphasis added).

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4. Again, there is a question of waiver, which is dealt with in Section V, *infra*.

According to Detective Leaming's own testimony, Petitioner on several occasions stated that he would talk about the case *after* he arrived in Des Moines and saw Mr. McKnight; and Mr. Kelly also told Detective Leaming that Petitioner was not to talk until he saw Mr. McKnight in Des Moines. All of these statements were made after the *Miranda* warnings were given when Detective Leaming first met Petitioner at 1:14 p.m.—warnings which were never repeated during the remainder of the trip. Clearly, Petitioner and Mr. Kelly indicated, not just "in any manner," but directly and explicitly, that Petitioner wished to remain silent during the automobile trip. Under *Miranda,* interrogation should have ceased; but Detective Leaming, with the specific intent to obtain incriminating statements, and with knowledge of Petitioner's background of mental illness, encouraged Petitioner to talk by playing on his sympathies and by talking about his own "knowledge" as to the location of the body. The fact that statements were obtained in this way eloquently illustrates the validity of the Supreme Court's conclusion in *Miranda* that "statements taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." 384 U.S. at 474.

Quite apart from Detective Leaming's failure to cease interrogation after Petitioner expressed his desire to remain silent, his further failure to repeat the warnings at any time after his first meeting with Petitioner—and especially after Petitioner made his first incriminating statement—violated the *Miranda* holding. After outlining the warnings required before in-custody interrogation, the Supreme Court held that "[o]pportunity to exercise these rights must be afforded . . . throughout the interrogation." 384 U.S. at 478. In *United States* v. *Nielson*, 392 F.2d 849 (7th Cir. 1968), the defendant was arrested and given *Miranda* warnings; he was then offered a "waiver of rights"

form by the interrogating officers. The defendant responded that "I am not signing anything until I have occasion to talk to [my lawyer]." 392 F.2d at 851. When given the opportunity to call his lawyer, he said that "it could wait." He was then asked several questions, which he answered in the negative; these answers were then admitted into evidence at his trial. The Court of Appeals reversed the conviction, holding that when a defendant expresses a willingness to talk after expressing his desire to remain silent, *Miranda* requires that the police make further inquiry "before continuing the questioning to determine whether the apparent change of position was the product of intelligence and understanding or of ignorance or confusion." 392 F.2d at 853. This Detective Leaming clearly did not do.

Except for the fact that the absence of the defendant's attorney in *Nielson* apparently was voluntary on the defendant's part, while the absence of Petitioner's attorney in this case was not, *Nielson* clearly applies to this case. In the language of *Miranda,* Petitioner was not afforded an "opportunity to exercise these rights . . . throughout the interrogation." At the very least, after Petitioner's first incriminating statements about the victim's clothing and then about the location of the body, Detective Leaming should have repeated the *Miranda* warnings, or otherwise made an effort to insure that Petitioner understood his rights, before continuing his questioning. And this would have been so even if Detective Leaming had not already preceded these statements with constitutionally improper interrogation.

The case of *Mathies* v. *United States*, 374 F.2d 312 (D.C. Cir. 1967), also has some clear implications for this case. In *Mathies,* the defendant, with the approval of counsel, had executed an affidavit which exonerated a

prisoner named Swann by incriminating the defendant. When the police were informed by Swann of this affidavit, they arranged for a confrontation involving Swann, the defendant, and the police. The defendant's counsel was not informed of the meeting; but the defendant was informed of his rights. At this confrontation, the defendant acknowledged the validity of the affidavit and reaffirmed his involvement in the crime. Although the Court of Appeals held that the defendant had not been prejudiced by the introduction of the affidavit, since it was not the product of police misconduct and could have been authenticated at trial without evidence of the defendant's later acknowledgement, Chief Justice (then Circuit Judge) Burger's opinion stated unequivocally that it was improper for the police to interview the defendant in the absence of notice to his counsel, and noted that "[t]he prospective application of *Miranda* . . . plainly will require that such interviews can be conducted only after counsel has been given an opportunity to be present." 374 F.2d at 315 (n. 3). The record in this case clearly shows that Petitioner's attorneys, Mr. McKnight and Mr. Kelly, not only were not "given an opportunity to be present," but were purposefully prevented from being present.

As the Tenth Circuit has held in *United States* v. *Thomas*, 474 F.2d 110, 112 (1973), *cert. denied*, 412 U.S. 932 (1973):

> [o]nce a criminal defendant has either retained an attorney or had an attorney appointed for him by the Court any statement obtained by interview from such defendant may not be offered in evidence for any purpose unless the accused's attorney was given a reasonable opportunity to be present.

See, United States v. *Durham*, 475 F.2d 208 (7th Cir. 1973).

V

The preceding analysis has not conflicted directly with that of the state trial court or the Supreme Court of Iowa—largely because it has ignored for the most part the issues on which these courts decided this case against Petitioner: waiver. The state trial judge, following a hearing on a motion to suppress, found "as a fact that the defendant did voluntarily give information to the officers and thus waived his right to have an attorney present during the giving of such information." R. at 35. The trial court's conclusion was based on "the time element involved in the trip, the general circumstances of it, *and more importantly the absence on the Defendant's part of any assertion of his right or desire not to give information absent the presence of his attorney. . . .*" R. at 35 (emphasis added). After an independent review of the issue, and of the record, the Supreme Court of Iowa supported and upheld these conclusions. *State* v. *Williams*, 182 N.W. 2d 396, 402 (Iowa 1969).

As it relates to the issue of waiver and whether there was a waiver, the Court has previously determined under the factual situation in this case that there could be no effective waiver, given the Sixth Amendment violation inherent in the breaking of the agreement not to interrogate and the other efforts by Detective Leaming to interrogate Petitioner in the absence of counsel. However, since waiver is relevant at least to the *Miranda* violation, and since the resolution of the issue of waiver in any event must be favorable to Petitioner, the Court now will proceed to an analysis of waiver in this case.

Under 28 U.S.C. § 2254(d), a "determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction" generally is given a presumption of correctness in a federal habeas corpus

action. Consistent with this, this Court has given great deference to the findings of fact made by the trial judge in this case, and as has been noted previously, none of the findings of fact outlined in Section II, *supra,* conflicts with findings of fact made by that state court. However, on this record, this Court must agree with the dissenting opinion in *State* v. *Williams, supra*—and therefore disagree with the conclusion of the trial judge and of the Iowa Supreme Court majority that Petitioner waived his Fifth and Sixth Amendment rights during the trip from Davenport to Des Moines on December 26, 1968.

This failure to adopt the state courts' conclusions on the issue of waiver is based on three separate, though related, considerations. *First,* 28 U.S.C. §2254 speaks of a presumption in favor of the state court's findings of *fact;* the issue of waiver, however, is one of *law.* The United States Supreme Court recently has recognized this very distinction in *Neil* v. *Biggers,* 409 U.S. 188 (1972). In reversing the decisions of both the United States District Court and the Court of Appeals, the majority in *Biggers* answered the dissenters' criticism that they had not followed the lower courts' findings of fact by holding that where the issue is one not purely of fact, but of the *constitutional significance* of these facts, the usual presumption in favor of the lower courts' findings does not apply. In the instant case, the issue—waiver—similarly is one of the constitutional significance of essentially undisputed facts, and hence there is no presumption of validity of the state courts' conclusions on this issue.

Second, it appears clear from the state courts' articulation of their reasons for finding waiver that they applied the wrong constitutional standards in making that finding. The Court in *Miranda* explicitly held that:

> If the interrogation continues without the presence of an attorney and a statement is taken, *a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . .*
>
> An express statement that the individual is willing to make a statement *and* does not want an attorney followed closed by a statement could constitute a waiver. But a *valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.* 384 U.S. 436 (emphasis added).

This strict standard of waiver in cases involving custodial interrogation, such as *Miranda* and *Escobedo,* recently has been reaffirmed by the United States Supreme Court in *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973).

In this case, there is *nothing* in the record to indicate that Petitioner waived his Fifth and Sixth Amendment rights *except* the fact that statements eventually were obtained. The heavy emphasis by the trial court on the "absence . . . of any assertion of his right or desire not to give information absent the presence of his attorney" conflicts directly with the Supreme Court's holding that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given." In short, *Miranda* makes it clear that it is the *government* which bears a heavy burden of affirmatively demanding his rights, even after the appropriate warnings have been given—but that is the burden which explicitly was placed on Petitioner by the state courts.

Finally, under the proper standards for determining waiver, there simply is no evidence to support a waiver.[5] As noted in the preceding paragraph, there is no affirmative indication, other than the challenged statements themselves, that Petitioner did waive his rights. Moreover, the state courts' emphasis on the absence of a demand for counsel was not only legally inappropriate, but factually unsupportable as well, since Detective Leaming himself testified that Petitioner, on several occasions during the trip, indicated that he would talk *after* he saw Mr. McKnight. Both these statements and Mr. Kelly's statement to Detective Leaming that Petitioner would talk only after seeing Mr. McKnight in Des Moines certainly were assertions of Petitioner's "right or desire not to give information absent the presence of his attorney . . . ." Moreover, the statements were obtained only after Detective Leaming's use of psychology on a person whom he knew to be deeply religious and an escapee from a mental hospital—with the specific intent to elicit incriminating statements. In the face of this evidence, the State has produced no affirmative evidence whatsoever to support its claim of waiver, and, a fortiori, it cannot be said that the State has met its "heavy burden" of showing a knowing and intelligent waiver of Fifth and Sixth Amendment rights.

This conclusion would be unavoidable even absent the initial agreement between Mr. McKnight and the police that Petitioner would not be questioned until he arrived in Des Moines. But that agreement, if it did not vitiate entirely the issue of waiver, clearly added to the already heavy burden of the State on that issue, and makes even more plain the failure of the State to demonstrate a waiver.

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5. Thus, even if waiver were a question of fact, this Court's conclusion, would be that the state courts' determination of waiver "is not fairly supported by the record. . . ." 28 U.S.C. § 2254(d)(8).

VI

One further argument of the Petitioner remains; that his confession was given involuntarily. Although the preceding findings of fact and conclusions of law already dispose of the case in Petitioner's favor, this Court believes it appropriate to deal also with this "voluntariness" claim. Preliminarily, it is useful to note that the state courts considered the issues of waiver and of voluntariness as a single issue to be decided on the "totality of the circumstances."[6] However, the Supreme Court recently has held that these are issues which, though related, are distinct. *See, Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973).[7]

In considering the issue of voluntariness solely on the state court record, and without further evidentiary hearings, this Court of course must, under 28 U.S.C. § 2254(d), "exercise caution . . . from determining factual questions anew . . . ." *Iverson* v. *North Dakota,* 480 F.2d 414, 426 (8th Cir. 1973). At the same time, the *Iverson* holding does not conflict with the well established rule that a court in reviewing a challenge to the voluntariness of a confession is to "examine the entire record and make an independent determination of the ultimate issue of voluntariness"—even in a habeas corpus case. *Davis* v. *North Carolina,* 384 U.S. 737, 741-42 (1966). The Court of Appeals in *Iverson* simply held that on the record before the District Court in that case, it could not be held as a matter

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6. [T]he Defendant did voluntarily give information to the officers and thus waived his right to have an attorney present"; "he voluntarily waived such right. . . ." R. at 35.

7. Briefly, the issue with regard to "waiver" is whether the accused understood his rights and intelligently and voluntarily waived them, while the issue with regard to "voluntariness" is whether the accused's actions were the product of the free exercise of his will. The accused's knowledge of his rights is a factor to be considered in the totality of the circumstances surrounding voluntariness, but is not dispositive of the issue. *Schneckloth* v. *Bustamonte, supra.*

of law that the challenged confession was involuntary—and then remanded for further fact-finding proceedings. *Iverson* v. *North Dakota, supra,* at 426, 427.

It is the prosecution which bears the burden of demonstrating voluntariness, at least by a preponderance of the evidence. *Lego* v. *Twomey,* 404 U.S. 477 (1972). Although this Court does not disagree with any of the findings of *fact* made by the state trial court, based on an independent examination of the record which has accepted the State's version of contested facts, it cannot agree with the state courts that the State met its burden of showing that Petitioner's statements were voluntarily given. In reaching this conclusion, the Court has given particular attention to *Spano* v. *New York,* 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959). In *Spano,* the defendant, after some eight hours of questioning, gave a confession; the confession was admitted at his trial, and the defendant was convicted. At the time of the questioning, the defendant had surrendered himself and had retained counsel. Following the instructions of his attorney, the defendant at first refused to answer questions, and asked to talk to his attorney; this request was denied. Eventually, a fledgling police officer named Bruno, a close friend of the defendant, was induced to tell the defendant (falsely) that his job would be placed in jeopardy if the defendant did not talk. The defendant then gave a statement. In reversing the conviction on the ground that the confession was involuntary, the Supreme Court emphasized three main factors: (1) the police officers' denial of the defendant's requests to talk to his attorney; (2) the psychological approach characterized by "sympathy falsely aroused" by Bruno; and (3) the intent of the police to get a confession from the defendant. 360 U.S. at 323-24. Factors closely analogous to these are present in the instant case.

First, Detective Leaming, although he did not deny during the automobile trip a direct request from Petitioner for his attorney, ignored his agreement with Mr. McKnight that Petitioner would not be questioned, refused Mr. Kelly permission to ride along in the car to Des Moines, and ignored Petitioner's several statements that he would talk *after* he saw his attorney. *Second,* Detective Leaming, with full knowledge of Petitioner's religious nature and history of mental illness, used a psychological approach which purposefully played on religion and on Petitioner's sympathies. Moreover, Detective Leaming admittedly was less than honest with Petitioner concerning his supposed knowledge that the victim's body was near Mitchellville. And *third,* Detective Leaming himself admitted that it was his specific purpose in talking to Petitioner to obtain incriminating statements from Petitioner before he had a chance to reach Mr. McKnight. Added to these factors is the coercive atmosphere which is inherent in a counselless automobile ride with police officers.

Against these factors strongly pointing to *in*voluntariness, there is very little evidence to sustain the State's burden of showing voluntariness. *Miranda* warnings were given; but they were given some time before the incriminating statements were obtained, and they were followed by several indications that Petitioner wished to talk only in the presence of his attorney. The state courts also placed some emphasis on the timing of the statements, and this is one area in which the state court record is not quite as clear as it might be. Nevertheless, Detective Leaming's own testimony shows that even before he spoke to Petitioner about the weather, the desirability of a "good Christian burial" for the victim, and his "knowledge" that the body was near Mitchellville, he and Petitioner discussed a large number of topics, including Detective Leaming's background and attitudes, Petitioner's friends, Petitioner's

Reverend, a Mr. Searcy, whether the police had checked for fingerprints in Petitioner's room at the YMCA, religion, the intelligence of other people, police procedures, organizing youth groups, singing, playing a piano, playing an organ, "and this sort of thing." R. at 119. Whatever treatment these topics were given, discussion of all of them must have consumed a considerable amount of time. Following Detective Leaming's lengthy and purposeful plea about locating the body for burial purposes and his admittedly false statement about knowing that the body was near Mitchellville, Detective Leaming told Petitioner not to answer then, but to "think about it" as they were riding down the road. Finally, after the initial stop at Grinnell, but before Petitioner's statements about the location of the body, there was further conversation about "people and religion and intelligence and friends of his, and what people's opinion (sic) was of him and so forth." R. at 123.

As noted above, the trial record is not as clear as it might be with regard to the timing of Petitioner's incriminating statements vis-a-vis the conversations between Detective Leaming and Petitioner. However, the lack of perfect clarity is not sufficient to preclude a finding of involuntariness here. For one thing, it was the State's burden to show voluntariness, and therefore the State's burden to make timing clear if it was important. More significantly, it seems clear from Detective Leaming's own testimony about the amount of conversation which took place that Petitioner's statements could not have been made after too long a lull in that conversation. And most importantly, Detective Leaming's approach specifically was not designed to elicit an immediate response to a direct question. Rather, Detective Leaming *asked* Petitioner to wait before he answered and to "think it over," and in a very real sense the fact that Petitioner did so would only indicate the success of the interrogator's tactics. Finally,

in light of the interrogator's approach, both with regard to the "Christian burial" and the "knowledge" that the body was near Mitchellville, it is not surprising that it was at a spot relatively near Mitchellville that Petitioner made his statements concerning the location of the body.

In short, there are many factors pointing strongly to involuntariness, and the State simply failed to meet its burden of showing voluntariness.

VII

The holding of this Court is that all of the incriminating statements elicited from Petitioner during the December 26, 1968, automobile trip from Davenport to Des Moines were obtained in violation of Petitioner's Fifth and Sixth Amendment rights, and hence evidence of these statements should not have been admitted at Petitioner's trial. Under *Chapman* v. *California*, 386 U.S. 18 (1967), trial court errors of constitutional dimension necessitate reversal of a criminal conviction unless it can be shown beyond a reasonable doubt that the error did not prejudice the defendant. Here, the prejudice is obvious, and hence Petitioner's requested relief should be granted.

This Court's decision does not touch upon the issue of what evidence, if any, beyond the incriminating statements themselves must be excluded as "fruit of the poisonous tree." Cf., *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Neither party to this action has raised this issue, and since the issue is neither necessary to a judgment of reversal nor an independent alternative ground for reaching that judgment, it will be left as a point for decision by the appropriate state court in the event that there is a re-trial of this case. However, insofar as the matter of the admission of certain portions of the evidence may be concerned which is

"fruit of the poisonous tree," the Court cites *Killough* v. *United States*, 336 F.2d 929, 934 (D.C. D.C. 1964).

The granting of a writ of habeas corpus, particularly by a federal court, is always a serious matter; and it is made even more serious in this case by the apparent clarity with which the evidence in the record connects Petitioner, at least in some manner, with an especially reprehensible crime. At the same time, the very foundation of our social and political order is the rule of law, and while one may sympathize with Detective Leaming's desire to locate the victim's body, his actions clearly and grossly violated the fundamental guarantees which our Constitution and laws have set up to govern the conduct of those engaged in law enforcement activities. Although both his general approach and his failure to observe the dictates of the *Miranda* case would themselves necessitate reversal of the conviction in this case, Detective Leaming's breaking of the agreement with Mr. McKnight and his purposeful and deliberate efforts to isolate Petitioner from his attorneys in order to obtain information are of particular concern to this Court. When the police and defendant's counsel have agreed that there will be no questioning in the latter's absence, when the defendant has been told by counsel not to say anything in his absence, and when the defendant repeatedly has stated his desire to remain silent until he sees his lawyer, the State must show much more than the fact that statements eventually were obtained in order to justify questioning of the defendant in the face of this assertion and reassertions of his constitutional right. To hold otherwise would not only fly in the face of legal precedent; it would also, as the dissent in *State* v. *Williams*, *supra*, pointed out, "discourage reasonable and sound approaches to criminal practice" by defense counsel. Indeed, to allow into evidence statements obtained as were the statements involved in this case might make it unethical

for defense counsel to advise a client to surrender in his absence, or to ever leave his client's side after arrest. If the right to counsel is to be preserved in any meaningful sense, agreements between counsel and the police involving matters such as interrogation must be lived up to. Cf., *Santobello* v. *New York*, 404 U.S. 257 (1971).

In addition to the constitutional prohibition against interrogation by Detective Leaming under these circumstances, the Court believes there are ethical considerations in the elicitation and use of the confession of the Petitioner obtained outside the presence of Petitioner's attorney and without the attorney's consent and advice to his client and after Petitioner had counsel—appointed or retained. *United States* v. *Thomas*, *supra*, 474 F.2d at 111-112.

The Court has spent a great amount of time reviewing the record of the State District Court and the Iowa Supreme Court and finds itself in full agreement with the ably written dissent of the Iowa Supreme Court in *State* v. *Williams*, *supra*. This Court is ever mindful of the emotional impact of such a decision as has been rendered by this Court today. This Court, however, even in a case involving a heinous crime with overwhelming evidence of a criminal defendant's guilt must adhere to the tenets of a constitutional approach to criminal procedure which has its ultimate goal a fair trial sustaining the rule of law. This Court today does say that the Petitioner shall be either afforded a new trial or the State must appeal to test the Court's ruling or a writ will issue.

Accordingly, it is ordered that the Petition for Writ of Habeas Corpus is sustained.

It is further ordered that the writ for release from custody shall not issue for the period of sixty (60) days

pending an appeal or the pursuit of a new trial by the State of Iowa. In the event of the pursuit of new trial without appeal, the writ shall not issue until judgment is made in the last court in which it is finally submitted.

It is further ordered that in the event an appeal is filed by the State of Iowa within sixty (60) days of this Order, the issuance of the writ shall be stayed pending the outcome of that appeal provided the appeal is diligently prosecuted by the State of Iowa.

CERTIFICATE OF SERVICE

I, Richard N. Winders, Assistant Attorney General for the State of Iowa, hereby certify that on this 11th day of April, 1975, three (3) copies of the Supplemental Appendix were mailed, correct postage prepaid, to:

Mr. Robert Bartels
College of Law
University of Iowa
Iowa City, Iowa 52242
Counsel for Respondent.

I further certify that all parties required to be served have been served.

RICHARD N. WINDERS
Assistant Attorney General
State Capitol
Des Moines, Iowa 50319
Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1263

LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS, a/k/a ANTHONY ERTHEL WILLIAMS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals appears as App. A to the Petition, and is reported at 509 F.2d 227 (8th Cir. 1975). The opinion of the district court has been filed herein as Supplemental Appendix F, and is reported at 375 F.Supp. 170 (S.D. Ia. 1974).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Under 28 U.S.C. § 2254(d), when both parties agreed to submit the case on the state court record, did the district court err in resolving factual issues that were not resolved by the state trial court, and in making an independent determination of the constitutional issues, on the basis of the state court record?

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2. Where the record disclosed no evidence of a waiver by the respondent of his Fifth or Sixth Amendment rights, did the district court and court of appeals err in holding that the respondent's Fifth and Sixth Amendment rights were violated when a police officer, using a psychological ploy with the specific purpose of obtaining incriminating information before the respondent could consult with his attorney, interrogated the respondent in a police car in the absence of counsel, in violation of an agreement with counsel not to interrogate the respondent, and after several indications by the respondent that he did not wish to provide any information about the crime until he had seen his attorney?

3. Should this Court overrule Miranda v. Arizona, Massiah v. United States, and Escobedo v. Illinois?

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant constitutional provisions and statutes are set forth in Appendix E to the Petition.

STATEMENT OF THE CASE

The facts that are relevant to the legal issues in this case are clearly and completely set out in the opinions of the district court (App. F at A2-A10, 375 F.Supp. at 172-75) and the court of appeals (App. A at A2-A6, 509 F.2d at 229-31). The following is a brief outline of those facts.[1]

On December 24, 1968, Pamela Powers disappeared from the YMCA in Des Moines, Iowa. Respondent subsequently became a suspect, and a warrant was issued for his arrest on a charge of child stealing. On December 26, respondent telephoned a Des Moines attorney, Mr. McKnight, from Rock Island, Illinois. On Mr. McKnight's advice, respondent turned himself into the police in Davenport, Iowa. Respondent was arraigned in Davenport on the warrant for child stealing.

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[1]The petitioner's statement of the facts (Pet. at 4-6) consists primarily of evidence immaterial to the issues in this action, which involves no dispute about the facts of the crime itself. Moreover, the petitioner's review of the facts omits much of the evidence relied upon by the district court and the court of appeals.

While at the Davenport police station, respondent again telephoned Mr. McKnight, who was then at the Des Moines police station. In the presence of several police officers, including Detective Leaming, Mr. McKnight told respondent that the Des Moines police would transport him from Davenport to Des Moines, that he would not be mistreated or grilled, and that he should not make any statement until he arrived in Des Moines. Mr. McKnight and the Des Moines police also made an agreement that the police would pick up the respondent in Davenport, but that the respondent would not be interrogated about the case during the return trip to Des Moines.[2]

On December 26, Detectives Leaming and Nelson drove from Des Moines to Davenport to pick up the respondent. After they arrived in Davenport, Detective Leaming advised the respondent of his Miranda rights; however, Miranda warnings were never repeated during the ensuing trip back to Des Moines.

During the trip to Des Moines, Detective Leaming engaged in conversation with the respondent -- who Leaming knew was an escapee from a mental institution -- with what he admitted was the specific purpose of obtaining as much incriminating information as possible from the respondent before the respondent reached his attorney in Des Moines.[3] This was done despite Detective Leaming's knowledge of Mr. McKnight's instructions to the respondent not to make any statements about the crime, and despite the agreement with Mr. McKnight that the respondent would not be interrogated. The initial conversation covered a number of topics, including singing, organizing youth groups, the police investigation, and religion. According to Leaming's own testimony, the respondent on several occasions stated that information about the crime would be provided after he consulted

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[2]The petitioner's reference to an "alleged" agreement (Pet. at 5) is disingenuous at best, since the state trial court specifically found that such an agreement was made. App. F at A9-A10; 375 F.Supp. at 176.

[3]"Q: . . . You were hoping to get all the information you could before Williams got back to McKnight, weren't you?
A: Yes, sir."
(Testimony of Detective Leaming, R. at 136-67; App. F at A6-A7, 375 F.Supp. at 174).

with his attorney in Des Moines, Nevertheless, Leaming made a direct effort to elicit incriminating information from the respondent.

> Eventually, as we were traveling along there, I said to Mr. Williams that, "I want to give you something to think about while we're traveling down the road." I said, "Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way to Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

When the respondent asked Leaming why he thought they would be passing by the body, Leaming responded that he knew that the body was somewhere near Mitchellville, Iowa.[4] Leaming then said: "I do not want you to answer me. I don't want to discuss it further. Just think about it as we're riding down the road."

After further discussion with Leaming, during which no Miranda warnings were given, and as the automobile approached the Mitchellville exit, the respondent stated that he would show the detectives where the victim's body was. He then did so.

The foregoing facts are not subject to dispute. In addition, the district court found two facts which are disputed by the petitioner: (1) that before the trip to Des Moines began, Mr. Kelly, a Davenport attorney with whom the respondent had consulted, told Leaming that the respondent should not be interrogated on the way to Des Moines; and (2) that Leaming refused Mr. Kelly permission to ride with the respondent to Des Moines. As will be argued more fully below, these findings clearly were correct; but in any event, they were not necessary to the district

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[4] In fact, Leaming did not know that the body was near Mitchellville, and admittedly made this statement solely to induce the respondent to divulge the location.

court's and court of appeals' decisions in this case.

At his trial, the respondent objected to the introduction in the state's case in chief of the statements obtained from him during the trip to Des Moines. After a hearing, these objections were overruled, the evidence was admitted, and the respondent was convicted. On appeal, the Iowa Supreme Court affirmed, with four Justices dissenting. On March 28, 1974, the district court granted the respondent's petition for a writ of habeas corpus; by agreement of the parties, this decision was based on the state court trial record. On appeal, the court of appeals affirmed, with Circuit Judge Webster dissenting.

ARGUMENT

Given the gross misconduct of Detective Leaming, the judgments of the district court and court of appeals in this case were clearly correct. Those judgments involved only direct, simple application of previous decisions of this Court, and no significant federal questions requiring review by this Court are presented.

I.

THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY APPLIED 28 U.S.C. § 2254(d) IN RESOLVING THE FACTUAL AND LEGAL ISSUES IN THIS CASE.

By agreement of the parties, the district court relied entirely on the state trial court record, which included extensive testimony by all of the individuals involved in the events of December 26, 1968, in making its findings of fact in this action. The district court scrupulously observed the general presumption of correctness given to state court findings by 28 U.S.C. § 2254(d), and none of its findings conflicted with those of the state trial court. App. F at A10, A22, 375 F.Supp. at 176, 181. The district court did resolve some factual issues left unresolved by the state trial court; but this of course was proper under the explicit language of 28 U.S.C. § 2254(d)(1). See also, Townsend v. Sain, 372 U.S. 293, 313-14 (1963). Moreover, the district court resolved the constitutional issues

differently from the state courts. Again, this was clearly proper: The state court "cannot have the last say when it . . . may have misconceived a federal constitutional right." Brown v. Allen, 344 U.S. 433, 508 (1952). See also, Townsend v. Sain, supra, at 318; Oregon v. Hass, ___ U.S. ___, 95 S.Ct. 1215 (1975); Doerflein v. Bennett, 405 F.2d 171 (8th Cir. 1969).

The petitioner complains that in resolving the issue of waiver, the district court found that respondent requested the assistance of counsel during the trip to Des Moines. (Pet. at 7). Actually, a specific demand for counsel during the trip was unnecessary to the district court's holding that the respondent's Fifth and Sixth Amendment rights were violated in this case, since Leaming in any event ignored statements by the respondent's counsel that he should not be interrogated and in fact broke an agreement with counsel that the respondent would not be interrogated until they arrived in Des Moines -- and since there was no evidence in the record to support the State's burden of demonstrating waiver. App. F at A23-A24, 375 F.Supp. at 182-83; see also, App. A at A12-A13, 509 F.2d at 232-33. Moreover, Detective Leaming himself testified without contradiction that the respondent on several occasions asserted that he would provide information about the crime after consulting with his attorney in Des Moines. This may not have been a precisely or elegantly stated request for counsel at that moment during the automobile trip (an obvious physical impossibility); but there can be no question that these assertions by the respondent indicated clearly that he did not wish to make any statements about the crime in the absence of counsel. App. F at A18, 375 F.Supp. at 179-80; App. A at A13; 509 F.2d at 233.

The petitioner also asserts that the district court "adopted Williams' version of the facts entirely" in resolving a conflict between the testimony of Leaming and that of Mr. Kelly, a Davenport attorney, with regard to (1) whether Mr. Kelly told Leaming that the respondent should not be questioned on the way to Des Moines, and (2) whether Leaming denied permission to Mr. Kelly to ride with the respondent to Des Moines in order to protect his rights (Pet. at 8-9). Contrary to the petitioner's assertion, however, the district court explicitly did not credit the respondent's

testimony on this issue because of his obvious interest in the case. Rather, the district court resolved the conflict in testimony in Mr. Kelly's favor because of his status as an attorney with no apparent interest in the outcome -- and, more importantly, because of the state trial court's explicit doubts as to the credibility of Leaming. App. F at A10, 375 F.Supp. at 176; see also, App. A at A7-A8, 509 F.2d at 231. Particularly when the parties have specifically agreed to submit the case on the basis of the state court record, it is appropriate for the federal district court to consider both the interests of the witnesses and the state court's findings with regard to credibility in resolving factual issues. See, Note, Developments in the Law: Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1134-35 (1970); Jackson v. United States, 353 F.2d 862, 866 (D.C. Cir. 1965).

The petitioner's argument that the district court erred in not holding an evidentiary hearing to resolve this issue of fact (Pet. at 9) is ludicrous. The petitioner specifically agreed to submit the case on the state court record, and made no effort to request any further evidentiary hearings after the district court's judgment of March 28, 1974. The state may have a right to an evidentiary hearing in a federal habeas corpus proceeding; but it nevertheless is clear that "either party may choose to rely solely upon the evidence contained in [the state court] record. . . ." Townsend v. Sain, supra, at 322; see also, Heyd v. Brown, 406 F.2d 346 (5th Cir. 1969), cert. denied, 396 U.S. 818.

Finally, it should be noted that resolution of the issue of Mr. Kelly's role in the events of December 26, 1968, was not in any sense necessary to the lower courts' decision in this case. Even if Mr. Kelly had not even been present during those events, Detective Leaming's conduct still grossly and repeatedly violated the respondent's Fifth and Sixth Amendment rights.

II.

THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY HELD THAT THE RESPONDENT'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE VIOLATED IN THIS CASE.

On the basis of the facts outlined above, both the district court and the court of appeals held that the interrogation of the respondent during the trip from Davenport to Des Moines violated the constitutional standards

of Miranda v. Arizona, 384 U.S. 436 (1966). There was no question that proper warnings were given before the trip to Des Moines began. However, Miranda does not simply require warnings and then permit interrogation to continue automatically. During the trip to Des Moines, the respondent clearly indicated, on several occasions, that he did not wish to provide any information about the crime until he saw his attorney. Yet Detective Leaming, in the face of an agreement with the respondent's counsel not to interrogate him, admittedly sought, through a psychological ploy, to induce the respondent to provide such information before they reached Des Moines and the respondent's attorney, Mr. McKnight. As the district court and court of appeals held, this was an obvious violation of the Miranda decision. App. F at A17-A18, 375 F.Supp. at 179-80; see also, App. A at A13-A14, 509 F.2d at 233-34.[5]

In the face of these Miranda violations, there was no evidence in the record to support the State's burden of demonstrating a valid waiver by the respondent of his Fifth and Sixth Amendment rights. App. F at A21-A24, 375 F.Supp. at 181-83; App. A at A12, 509 F.2d at 233.[6] The fact that the respondent consulted with counsel before the automobile trip and was advised by them not to make any statements (Pet. at 11) does nothing to show a waiver of the respondent's constitutional rights during the automobile trip. In fact, the record shows nothing but the giving of warnings and the subsequent obtaining of statements -- clearly not enough to support a showing of waiver under Miranda. App. F at A23-A24, 375 F.Supp. at 182-

[5]The district court also held that Detective Leaming's failure to repeat the Miranda warnings during his "conversation" with the respondent further violated Miranda. App. F at A18-A19, 375 F.Supp. at 180.

[6]Although Detective Leaming testified that the respondent indicated that he understood that he was represented by Mr. McKnight in Des Moines and Mr. Kelly in Davenport, the petitioner's quite different assertion that the respondent "expressly stated he understood [the Miranda warnings'] meaning" (Pet. at 11-12) is not supported by the record or by the findings of the district court or state trial court.

83; App. A at A12, 509 F.2d at 233.[7] At the same time, Detective Leaming's use of deceipt with the respondent's counsel, his use of psychological pressure with the respondent, and the respondent's assertions of his desire not to provide information about the crime in the absence of counsel all weighed heavily against a finding of waiver.

A number of courts of appeal have found violations of Miranda v. Arizona, supra, in situations presenting far less serious governmental misconduct than is apparent on the record in this case. See, e.g., United States v. Clark, supra; United States v. Durham, supra; United States v. Thomas, 474 F.2d 110 (10th Cir. 1973), cert. denied, 412 U.S. 932; United States v. Nielsen, 393 F.2d 849 (7th Cir. 1968). Moreover, this Court has recently recognized a Miranda violation in a situation that is indistinguishable from the instant case, except insofar as it presented far less egregious violations of constitutional rights. In Oregon v. Hass, supra, the defendant was given proper Miranda warnings; after making initial incriminating statements, he expressed a desire to consult counsel. This Court held that incriminating evidence obtained from the defendant after his expression of his desire to have counsel but before counsel had been appointed was admissible to impeach the defendant; but this Court also implicitly accepted the holding of the Oregon Supreme Court that this evidence must be excluded from the State's case in chief because it was obtained in violation of Miranda. Hass is factually indistinguishable from the instant case -- except that in Hass, the defendant did not have counsel, and there was no evidence of psychological trickery or of the breaking of any agreements with

[7]The petitioner's assertion that Detective Leaming's "statement about the weather and locating the body occurred approximately two hours before Williams made any incriminating statements" (Pet. at 12) is not supported by the findings of fact of the district court or the state trial court. Indeed, the district court noted that the timing of Detective Leaming's "Christian burial" speech was not precisely clear from the record, but that this speech apparently occurred after a considerable amount of other conversation. In any event, as the district court noted, given Detective Leaming's approach, the timing of the speech was not really important. App. F at A27-A29, 375 F.Supp. at 184-85.

The petitioner's assertion that the respondent initiated conversations with Detective Leaming (Pet. at 12) similarly is unsupported by any finding of the district court or state courts, and seriously distorts the record. Indeed, Detective Leaming himself acknowledged on cross-examination that it was he who initiated conversation when the trip began. (T.T. at 261).

counsel not to interrogate the defendant. See also, Mathies v. United States, 374 F.2d 312 (D.C. Cir. 1967) (opinion by Burger, J.).

Both the district court and the court of appeals also held that the respondent's right to counsel was violated during the automobile trip to Des Moines, quite apart from Miranda. The Sixth Amendment violations in this case are at least as glaring as those involved in Massiah v. United States, 377 U.S. 201 (1964),[8] and Escobedo v. Illinois, 378 U.S. 478 (1964): According to the state court findings and Detective Leaming's own testimony, Detective Leaming used deceipt to isolate the respondent from his attorney and a psychological ploy to obtain incriminating information from the respondent before he could consult with him -- despite the agreement with Mr. McKnight that the respondent would not be interrogated and the respondent's own repeated assertions that he did not wish to provide information about the crime until he had seen his attorney. See also, McLeod v. Ohio, 381 U.S. 356 (1965).

A number of decisions of the circuit courts of appeal have reversed convictions on the basis of infringements of the right to counsel that were far less serious than those involved here. For example, in Taylor v. Elliot, 458 F.2d 979 (5th Cir. 1972), cert. denied, 409 U.S. 884, state agents transporting the defendant to Birmingham, Alabama, merely ignored the accused's mother's statement, relaying advice from defendant's counsel, that he was to make no statements until he arrived in Birmingham. The court of appeals held that statements obtained by the officers during the trip were improperly admitted into evidence under the Sixth Amendment, even though there was no evidence either of an agreement not to interrogate or of psychological coercion. See also, United States v. Clark, 499 F.2d 802 (4th Cir. 1974); United States v. Durham, 475 F.2d 208 (7th Cir. 1973); United States v. Crisp, 435 F.2d 354 (7th Cir. 1970), cert. denied, 402 U.S. 947; U.S. ex rel. Magoon v. Reincke, 304 F.Supp. 1014 (D. Conn. 1968),

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[8] Although the petitioner did not raise the issue, the district court found that adversary judicial proceedings had been initiated prior to the trip to Des Moines, since the respondent had been arrested and arraigned on the child-stealing warrant. App. F at A11-A12, 375 F.Supp. at 176-77.

aff'd, 416 F.2d 69 (2d Cir. 1969).

Contrary to the petitioner's assertion (Pet. at 10), the district court did not base its Sixth Amendment holding on the principle that the right to counsel could never be waived in the absence of counsel. The district court's conclusion that the respondent in this case could not have effectively waived his right to counsel was explicitly and carefully limited to the facts of this particular case:

> When the police have agreed with the defendant's attorney that the defendant will not be questioned in the attorney's absence, when another attorney has asked to be with the defendant at a particular time and place, and when the defendant has repeatedly asserted his desire not to talk in the absence of counsel, the police plainly should not be permitted to interrogate the defendant at all until further notice is given to his counsel. To hold otherwise would make it impossible for defense counsel fully to protect his client's rights without staying with him 24 hours a day.
>
> App. F at A15-A16, 375 F.Supp. at 178-79.

In any event, as discussed supra, the district court and court of appeals correctly held that the state had shown no evidence to meet its burden of showing a valid waiver by the respondent of his constitutional rights.

III

THIS COURT SHOULD NOT OVERRULE ITS DECISIONS IN MASSIAH v. UNITED STATES, ESCOBEDO v. ILLINOIS, AND MIRANDA v. ARIZONA.

The weakness of the petitioner's position in this case is illustrated not only by his concentration on irrelevant facts in his Statement of the Case, but also by his explicit request that this Court overrule its decision in Miranda v. Arizona, supra. (Pet. at 13-14). This case did not involve the use of Miranda-violative statements to impeach, compare, Harris v. New York, 401 U.S. 222 (1971), Oregon v. Hass, supra; nor did it involve the use of derivative evidence obtained before the Miranda decision, compare Michigan v. Tucker, 417 U.S. 433 (1974). Rather, the district court and court of appeals reversed the conviction because of the use of the respondent's statements in the State's case in chief. Thus, the petitioner is forced to ask this Court to overrule directly Miranda v. Arizona. Such a decision would, however, clearly be inappropriate in this case, for a number of reasons.

First, the petitioner's assertion that "today's better trained criminal justice personnel are demonstrating maturity and responsibility and the system as a whole can be trusted not to abuse a more flexible standard" (Pet. at 13) is not only totally unsupported, but also proves too much. To the extent that police conduct has improved in response to the Miranda decision, the pressure toward "mature and responsible" police conduct that is provided by Miranda should be maintained, lest police conduct regresses to pre-Miranda levels.[9] The facts of this case, which occurred well after the Miranda decision, amply illustrate the need for continued application of the Miranda guidelines, particularly insofar as they prohibit the interrogation of an accused after he has been purposefully isolated from counsel and in the face of indications by the accused that he wishes to remain silent in the absence of counsel.

Moreover, even if consideration of the overruling of Miranda were appropriate, this would not be an appropriate case in which to do so, since such a decision still would not change the judgments of the district court and court of appeals. This is not a case in which Miranda had to be "mechanically" or "technically" applied in order to reach the result that was reached by the district court and court of appeals. As those courts carefully pointed out, Detective Leaming's purposeful isolation of the respondent from his counsel, his breaking of the agreement with the respondent's counsel, his ignoring of the respondent's several statements of his desire to provide information only after consulting with counsel, and his admitted attempts to obtain information from the respondent before he had an opportunity to consult with his attorney would require reversal of the respondent's conviction quite apart from the Miranda decision. In order to change the result reached by the district court and court of appeals, petitioner must ask this Court to overrule not only Miranda, but also virtually every other decision of this Court involving Fifth and Sixth Amendment rights, including Massiah v. United States and Escobedo v. Illinois, supra.

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[9] Moreover, if the police are now more responsible, then application of the Miranda standards to exclude improperly obtained evidence from the prosecution's case in chief will not have an adverse impact on the interests of the State in a significant number of cases.

Indeed, petitioner in effect must ask this Court to pretend that the Fifth and Sixth Amendments themselves do not exist.

CONCLUSION

The record in this case shows gross and repeated violations of the respondent's Fifth and Sixth Amendment rights and the decision of the district court and court of appeals were clearly correct. Even if the overruling of Miranda were appropriate, such a decision would be fruitless in this case, since the constitutional violations herein do not hinge upon the requirements of that case. Hence, this case presents no significant federal questions requiring review by this Court, and the petition for a writ of certiorari therefore should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1975

No. 74-1263

LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS, a/k/a ANTHONY ERTHEL WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION BELOW

The United States District Court for the Southern District of Iowa in *Williams v. Brewer*, 375 F. Supp. 174 (SD Iowa 1974), sustained a petition for writ of habeas corpus and ordered release of the respondent, convicted of murder, from the penitentiary unless an appeal was taken or a new trial pursued by the State of Iowa within 60 days. Supplemental Appendix (Appendix F) to Peti-

tion For Writ of Certiorari. The United States Circuit Court of Appeals for the Eighth Circuit affirmed, 2 to 1, Judge Webster dissenting. 509 F. 2d 227 (8th Cir. 1975). Appendix A of the petition for writ of certiorari (A. p. 1). Thus these cases remanded a murder conviction for a new trial, holding that respondent-defendant's statements and acts in voluntarily taking police to find the victim's body were inadmissible. The jury's verdict, based on said statements and acts, had been upheld 5 to 4 by the Iowa Supreme Court in *State v. Williams*, Iowa, 182 N. W. 2d 396 (1970) (see Appendix p. 2). Iowa's petition for certiorari has been granted.

—o—

JURISDICTION

On December 31, 1974, the Court of Appeals for the Eighth Circuit filed its Opinion and Judgment (Appendix A, p. A1, Petition for Writ of Certiorari). On January 30, 1975, the Court of Appeals for the Eighth Circuit filed its order denying petition for rehearing en banc (Appendix C, p. A23, Pet. for Cert.), with three judges voting to grant the petition. Upon a motion filed by Petitioner State of Iowa, a stay of issuance of the mandate was granted on February 6, 1975, provided that an application by the State of Iowa be made to the United States Supreme Court for a Writ of Certiorari (Appendix D, p. A24, Pet. for Cert.). The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1254 (1).

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QUESTIONS PRESENTED

1. Should the oft-challenged doctrine of *Miranda v. Arizona*, 384 U. S. 436 (1966) now be disapproved?

2. Can an accused waive his Sixth Amendment right to counsel in absence of counsel previously retained who had advised the accused to remain silent?

3. Did the federal courts err in ignoring relevant evidence from which the jury and the Iowa Supreme Court could and did properly infer that accused waived his Fifth and Sixth Amendment rights?

4. Did the federal courts exceed their authority by disregarding the presumption of correctness given to state court written findings of fact by 28 U. S. C. § 2254 (d) and by making different findings of fact on disputed evidence contrary to the jury's verdict without an evidentiary hearing as required by *Townsend v. Sain*, 372 U. S. 293 (1963), despite a stipulation that the case be heard in U. S. District Court on the Iowa Supreme Court record?

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CONSTITUTIONAL PROVISIONS AND STATUTES

Amendments V, VI, and XIV of the Constitution of the United States, Title 18 U. S. C. § 3501, and Title 28 U. S. C. § 2254 (d) are set forth in Addendum A hereof.

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STATEMENT OF THE CASE

About noon on the day before Christmas 1968, 10 year-old Pamela Powers accompanied her mother to the Des Moines YMCA. Her brother, Mark, was competing in a wrestling match and Pamela and her mother came to cheer him on. Pamela bought a candy bar but remembered playing with her puppy and asked her mother if she could go wash her hands. She was never seen alive again by any known witness except her murderer.

Two days later, Pamela's frozen body, clad only in her undershirt, was found in a ditch on a country road off the Mitchellville exist from Interstate 80, a few miles east of Des Moines. A medical examination showed that Pamela had been sexually ravaged. Seminal fluid was found in her mouth, rectum, and vagina. The medical examiner testified that there were no signs of pressure on the external areas of Pamela's neck and throat, but the interior of her mouth was torn and bruised. Death was due to strangulation.

About an hour and a half after Pamela disappeared, respondent Robert Anthony Williams, a/k/a Anthony Erthel Williams, age 25, hereinafter referred to as "Williams," a YMCA resident, was seen carrying a blanket-wrapped bundle through the YMCA lobby. YMCA personnel, who had been searching for Pamela, attempted to stop him after he walked outside. Williams shoved one of them back, jumped into his 1960 Buick and drove rapidly away. A 14 year old boy who, at Williams' request, opened the door on the passenger side of the car parked in front of the YMCA, testified that as Williams stuffed the bundle into the front seat he "saw two white

legs in it and they were skinny and white." (A. p. 63). At the trial, in April, 1969, that lad was able to identify Williams.

On the morning of December 26, 1968, Mr. McKnight, a Des Moines attorney, received a telephone call from Williams, who was then in Rock Island, Illinois (A. p. 70), about 180 miles east of Des Moines on I-80. Mr. McKnight advised him to surrender to the police in Davenport, Iowa (just across the Mississippi); that if he surrendered in Illinois it would take longer for him to get back to Des Moines (A. p. 88). At approximately 8:40 that same morning (Dec. 26), Williams surrendered to the Davenport police, who arrested and booked him, and read him the *Miranda* warnings (A. p. 42).

Meanwhile, Attorney McKnight had gone to the Des Moines police station and advised Chief of Police Nichols that Williams was going to surrender (A. p. 37). Shortly after arriving, McKnight received a telephone call from Williams from the Davenport police station. Mr. McKnight's end of the conversation was made in the presence of Chief Nichols and Captain Leaming (A. p. 37, p. 54), a veteran detective who had served the Des Moines Police Department for nearly 20 years.

Chief Nichols testified that McKnight told Williams Des Moines police officers would pick him up; "that [they] would be nice to him; that they were nice people; that they weren't going to grill him or beat him around; to come back to Des Moines with the officers and that we would talk it over in Des Moines." (A. p. 33).

During this telephone conversation, Leaming testified Mr. McKnight advised Williams, "You have to tell the

officers where the body is. . . . You have got to tell them where she is. . . . It makes no difference, you have got to tell them, you have already been on national hook-up. . . . What do I mean by national hook-up? . . . I mean you have been on television nationally, so that makes no difference. You have got to tell them where she is. . . . It makes no difference anyway. When you get back here, you tell me and I'll tell them. I'm going to tell them the whole story." Then Mr. McKnight told Williams, "Mr. Leaming is coming after you. I know this man personally, he's a fine man and he won't let any harm come to you." (A. p. 96).

Leaming and Nichols said McKnight told them that the little girl was dead when she was taken from the YMCA (A. pp. 96, 97, 108).

Mr. McKnight called Chief Nichols on direct examination and asked: "I said we all said she was probably dead when she left the hotel [YMCA?]. We all thought that. Isn't that what was said?" (A. p. 108). Nichols said, "The statement you made was, 'I figured she was dead. I know she's dead.' And I think at that point that conversation was not limited to you. I'm sure I may have said the same thing. Speculating." (A. pp. 108-109). Otherwise, Mr. McKnight did not dispute the testimony nor did he ever testify or offer evidence to the contrary.

The state trial court, following a pre-trial motion, found that an agreement existed between Mr. McKnight and the police that Williams was not to be questioned on the return trip to Des Moines; rather, he would talk to police officials, with his attorney, on arrival in Des Moines (A. p. 1). This finding was made, even though

Captain Leaming denied its existence (A. p. 54), and Chief Nichols testified, "There was no specific agreement made as far as a hard and fast agreement, you will not ask him anything, he will not tell you anything, except Mr. McKnight, over the telephone to Mr. Williams, stated, 'We will talk when you get here.'" (A. p. 40).

At approximately 9:30 A.M. Captain Leaming and Officer Nelson left Des Moines, enroute to pick up Williams (A. pp. 54, 55).

At 10:45 A.M., Williams was arraigned as a fugitive before Judge Metcalf in Davenport. Judge Metcalf again advised him of his rights and at Williams' request, had a private conference with him (A. pp. 43, 106).

Leaving the courtroom, Williams spotted a Mr. Kelly seated in the courtroom and asked if he was an attorney. The Judge said he was and Williams was granted a private meeting with Kelly (A. pp. 44, 106). After that meeting, but before the Des Moines police officers arrived, Mr. Kelly advised the Davenport police that Williams would remain silent (A. p. 73).

Williams was then taken to lunch and about 11:50 A.M., Officers Leaming and Nelson arrived at the Davenport Police Station (A. p. 74). After lunch, about 1:00 P.M., Mr. Kelly introduced Williams to Captain Leaming and Leaming advised Williams again, in the presence of Kelly, of his constitutional rights. This was the third time and last time Williams heard the *Miranda* warnings. Williams was then afforded two meetings alone with Mr. Kelly (A. pp. 75, 76).

Mr. Kelly testified that before the officers left with Williams he (Kelly) asked Captain Leaming if he could

ride back to Des Moines with Williams but that Leaming wouldn't let him (A. pp. 107, 108). Officer Leaming denied that Kelly made such a request (A. p. 56), although Judge Hanson of the U. S. District Court found that he did (Supp. Appendix F to Pet. for Cert. p. A5). Captain Leaming also denied that Mr. Kelly had told him that Williams would make no statements until he arrived in Des Moines (A. p. 78). Again, Judge Hanson believed Kelly (Supp. Appendix F p. A5). Captain Leaming, Officer Nelson and Williams left for Des Moines at approximately 2:00 P. M.

With Nelson driving and Leaming and Williams in the back seat of the police car, they drove west on I-80 toward Des Moines (163 miles from Davenport) (A. p. 77). A short distance out of Davenport, Williams "initiated a conversation" with Captain Leaming (A. p. 79). He asked Leaming if Leaming hated him or wished to kill him. He asked Leaming if they had checked for fingerprints in his room at the YMCA and whether they had questioned his friends or searched their houses. They discussed police procedures and religion, Williams telling Leaming about his interests in youth groups and playing the piano, organ, and singing (A. pp. 56, 79-81). Leaming testified that Williams asked questions about the missing Powers child (A. p. 57).

"Not very far out of Davenport" Captain Leaming testified *at the trial* he told Williams:

> "I want to give you something to think about while we're traveling down the road. Number one, I want you to observe the weather conditions, its raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all." (A. p. 81.)[1]

The foregoing testimony is undisputed and is quoted by the majority opinion of the Eighth Circuit (Appendix A, Pet. for Cert., p. A5).

In response to a question by Williams, Captain Leaming told Williams he had a theory Pamela's body

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1 At the pre-trial **suppression hearing,** Leaming's testimony was essentially the same:

> "'Reverend, I'm going to tell you something. I don't want you to answer me, but I want you to think about it when we're driving down the road.' I said, 'I want you to observe the weather. It's raining and it's sleeting and it's freezing. Visibility is very poor. They are predicting snow for tonight. I think that we're going to be going right past where that body is, and if we should stop and find out where it is on the way in, her parents are going to be able to have a good Christian burial for their little daughter. If we don't and it does snow and if you're the only person that knows where this is and if you have only been there once, it's very possible that with snow on the ground you might not be able to find it. Now I just want you to think about that when we're driving down the road.' That's all I said."

was in the Mitchellville, Iowa, area (A. pp. 63, 81).[2] Captain Leaming concluded this conversation by saying, "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." (A. p. 81). This testimony, which was undisputed at the trial, was not quoted in the majority opinion in the Eighth Circuit, but was emphasized in Judge Webster's dissent (App. A of Pet. for Cert. p. A17). This is the only time Captain Leaming mentioned locating the body (A. pp. 63, 64) and was at least two hours before they got to Mitchellville where the body was found (A. p. 8).

Williams testified at the *suppression hearing* that Leaming questioned him "periodically concerning" the location of the body and speculated that it was near Mitchellville (A. pp. 47, 48).

According to Captain Leaming, during the trip to Des Moines, Williams stated several times, "When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." (A. pp. 58, 61).

As they approached the Grinnell turnoff of I-80, approximately 100 miles west of Davenport, Williams asked, "Did you find her shoes?" (A. pp. 58, 81). Captain Leaming replied that he did not know, whereupon Williams directed the officers to a Skelly service station where he said he'd disposed of the shoes (A. pp. 81, 82). Williams' question about the shoes was not in response to any questioning by the officers (A. pp. 59, 62). After an unsuccessful search for the shoes, they returned to the Interstate.

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2 Judge Hanson of the U. S. District Court found that in fact Leaming "did not know that the body was near Mitchellville, and he made the statement to induce [Williams] to tell him where the body was." Supp. Appendix F, Pet. for Cert. p. A8.

As they proceeded toward Des Moines, Williams asked, "Did you find the blanket?" (A. p. 83). Leaming answered that if it was with the other clothing in a trash receptacle it had been found. Williams told Leaming he had put it in the same room (at a rest stop) but "it was over by a toilet." Williams then directed them to a rest area off I-80 where he said he had disposed of the clothing and blanket. Both clothing and blanket had already been found (A. p. 101). Williams' initial question about the blanket was not a result of any question asked him by Captain Leaming (A. p. 62).

They drove on toward Des Moines. Captain Leaming and Williams had discussions about people, religion, intelligence and friends of Williams. Some distance east of Mitchellville, Williams stated, "*I am going to show you where the body is.*" (A. p. 84). Nothing in the record suggests that Williams' statement was either coerced or in direct response to any question asked him. He then proceeded to direct the officers to the location of the body off the Mitchellville turnoff south of I-80 (A. pp. 101-102).

Williams was convicted, by jury verdict, of the crime of first degree murder and sentenced to life imprisonment in the Iowa State Penitentiary. In December, 1970, his conviction was affirmed 5 to 4 by the Iowa Supreme Court, the majority of the Court finding that Williams had waived his constitutional rights and voluntarily made statements which incriminated him (A. p. 2).

In October, 1972, Williams filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Iowa. Federal District Judge Hanson sustained the petition, finding that Williams' con-

stitutional rights guaranteed by the 5th, 6th, and 14th Amendments had been violated. Said judgment was affirmed by a three judge panel of the Court of Appeals for the Eighth Circuit, Judge Webster dissenting. Petition for rehearing en banc was denied, Chief Judge Gibson and Judges Stevenson and Webster voting to grant rehearing.

Judge Hanson found that Williams' statements "were obtained only after Detective Leaming's use of psychology on a person whom he knew to be deeply religious and an escapee from a mental hospital—with specific intent fo elicit incriminating statements" and that "the State has produced no affirmative evidence whatsoever to support its claim of waiver and, *a fortiori*, it cannot be said that the State has met its 'heavy burden' of showing a knowing and intelligent waiver of Fifth and Sixth Amendment Rights." (Supp. Appendix F to Pet. for Cert. pp. A24, A27). The state contends that there is little support *in the record* for Judge Hanson's finding that Detective Leaming used psychology. Leaming did call him "Reverend" (A. p. 63), said that the parents should be entitled to a Christian burial for their daughter (A. p. 81), talked to him about religious subjects (A. p. 81) and told him that ("I myself") "had had religious training and background as a child, and . . . I would probably come more near praying for him than I would to abuse him or strike him . . ." (A. p. 80 and Supp. Appendix F p. A5 to Pet. for Cert..) where Judge Hanson cites said testimony from the Iowa Supreme Court's record (A. p. 119). (That record has been certified to this Court.) There is no evidence that Detective Leaming "knew" Williams "to be deeply religious" although the state concedes that

Leaming suspected he was. While Leaming's notions are *outside the record,* he admits he was in fact playing upon Williams' religious conscience when he made the statements which are of record. And when he addressed Williams as "Reverend" he says he did so to win his friendship and confidence.

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SUMMARY OF ARGUMENT

Miranda v. Arizona, 384 U.S. 436 (1966), should be disapproved. The sole constitutional requirement for admissibility of an incriminating statement should be whether it is given voluntarily. The Court should adopt a totality of circumstances doctrine along the lines of those which may be found in 18 U.S.C. § 3501 (Addendum to this Brief) which has legislatively overruled the application of *Miranda* in federal courts.

Respondent Williams waived both his Fifth and Sixth Amendment rights to silence and counsel after being three times warned of his rights in Davenport and after having been arraigned and consulting with counsel retained by him who advised him not to talk to the police, and after telling officers who were bringing him back to Des Moines in a police car, "When I get to Des Moines and see Mr. McKnight [my attorney], I am going to tell you the whole story."

The Federal Courts below erred in ignoring relevant evidence from which the jury and the Iowa Supreme Court could and did properly infer that accused waived his Fifth and Sixth Amendment rights.

The Federal Courts also exceeded their authority by disregarding the presumption of correctness given state court written findings of fact by 28 U. S. C. § 2254 (d) and by making different findings of fact on disputed evidence than were found by the jury, without an evidentiary hearing as required by *Townsend v. Sain*, 372 U. S. 293 (1963). The attorneys for the parties agreed to submit the case to the District Court on the record of facts and proceedings in the state trial court. The District Court was bound by those findings of fact, as was the Eighth Circuit Court of Appeals. While both courts might make different conclusions of law, based on the facts, neither had a right to change or ignore the facts of record.

This Court should extend the doctrines of federalism, comity and abstention so as to restrict the use of the writ of habeas corpus in federal courts to review criminal convictions of the Iowa Supreme Court, our highest state appellate court.

Division I

Should the oft-challenged doctrine of Miranda v. Arizona, 384 U. S. 436 (1966) now be disapproved?

Mr. Justice White predicted in his dissent in *Miranda:*

> "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him." 384 U. S. at 763.

Unless *Miranda* is overturned or greatly restricted, this could be another of the many cases in which that

prophesy has come true. If it is to be held in this case that *Miranda* was violated and Williams' statments and acts in taking police to find Pamela's shoes, clothing, the YMCA blanket, and finally her body—statements and acts which were purely voluntary and untainted by the slightest coercion—are inadmissible where he had been advised by counsel to remain silent, the Court might as well exclude all confessions and admissions in a trial following a plea of not guilty. Under *Gideon v. Wainwright*, 372 U. S. 335 (1963), a defendant has an absolute right to counsel in a felony case. "Any lawyer worth his salt will tell the suspect to make no statement to police under any circumstances." Justice Jackson concurring in *Watts v. Indiana*, 338 U. S. 49, 59 (1949). Taken together, *Gideon* and *Miranda* compel an implication that a suspect in police custody *already* has counsel who has told him to keep his mouth shut. So no *intelligent* voluntary waiver of Fifth Amendment rights could ever be found in any felony trial in which the defendant had fled or tried to conceal his crime and later pleaded not guilty. "The result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not." Justice White, joined by Justices Harlan and Stewart, dissenting in *Miranda*, 384 U. S. at 538.

Anyone familiar with the criminal justice system knows that police interrogation is an essential tool in effective law enforcement and without confessions, justice would be left in shambles. We simply cannot afford the luxurious equality of abandoning incustody interrogation and convictions based upon confessions. See *In Cold Blood*, by Truman Capote. As Judge Webster said in

his dissent in this case (Appendix A, Pet. for Cert. p. A20), "If such conversations can be deemed coercive, we will have turned the criminal justice system upon its head."

Any criminal jury trial is based upon a search for the *truth* and it is human nature for anyone, and surely for any policeman, prosecutor, judge, or juror, to inquire first "What does the accused say about it?" Upon being informed that he admitted his misdeed it is equally natural to wonder "Was he compelled to make the admission?" *Miranda* is destructive of these very natural inquiries and offends our Socratic method of eliciting truth—the method implicitly known by all rational beings and which is the foundation of our judicial system. Solving crime by finding truth is the policeman's duty. So it is unreasonable to insist that police must advise suspects not give them evidence they sorely need to do that duty.

No one with a sense of fair play can tolerate coercion or brainwashing, let alone torture. But it is unthinkable that people seeking the truth should be prevented from hearing the spontaneous or *voluntary* utterances of an accused within a short time after being taken into custody.

In this case, of course, there is no question but that Williams' statements and acts were the truth. Otherwise, he could not have taken the police to Pamela's body. Thus no one has suggested that Williams was compelled to make an *untrue* statement or act against his own interest as people often do under physical torture or mental coercion. In this instance, the evidence is true, reliable

and trustworthy even assuming arguendo that Williams was tortured. (If Williams was tortured here it was only by his own conscience, albeit perhaps after Captain Leaming's mention two hours earlier that Pamela's parents deserved "a good Christian burial" for their little girl who was snatched from them on Christmas Eve. Or he may have simply assumed, as many guilty do, that his statements and acts would somehow redeem him.)

There are those who argue that the law is unfair to and discriminates against a poor, ignorant man without counsel, and in favor of his more intelligent and affluent brother. If so, *Miranda* is not the answer and reduces equality to an absurdity. There is no properly protected equality of opportunity to escape the consequences of one's crime. One should not be entitled to escape having to account for his conduct merely because others more clever have escaped. "Why pick on me?" is a swan song we hear from many who are apprehended. But it is no defense that others, equally guilty, have, at least not yet, also been prosecuted.

Every person should be presumed to know his rights, just as every person is ordinarily presumed to know the law. Our people could not long tolerate a society in which ignorance of the law was an excuse. Nor can they tolerate much longer a legal justice system which excludes evidence on a minor technicality or "prophylactic standard" in disregard of the "totality of circumstances" under which that evidence was obtained.

The trouble with these arguments we make here is that Justices Clark, Harlan, Stewart and White, in their dissenting opinions in *Miranda* made all of them and

more, much more eloquently. They said virtually everything which can be said against *Miranda's* requirements, but were nevertheless barely outvoted by their brethren.

We submit that the decision of a majority 5 of the 9 justices in *Miranda*, which has stood for less than 10 years, should now be rethought in the light of the many other decisions overruled but which had worked well for nearly a hundred years before *Miranda*. *Hopt v. Utah*, 110 U. S. 574 (1884); *Pierce v. United States*, 160 U. S. 355 (1896); *Wilson v. United States*, 162 U. S. 613 (1896). Pamela Powers, who lived only 10 years herself, deserves such reconsideration.

In *Michigan v. Tucker*, 417 U. S. 433 (1974), this Court recognized that the warnings enumerated in *Miranda* were merely

> "procedural safeguards [and] *were not themselves rights* protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." 417 U. S. at 444. (Emphasis added.)

With this premises, it is at once apparent that a failure to give such warnings should not necessitate exclusion of statements in every "conceivable context." *Michigan v. Tucker*, 417 U. S. at 451. See *Harris v. New York*, 401 U. S. 222; *United States v. Watts*, 513 F. 2d 5 (10th Cir. 1975); *State v. Hudson*, 325 A. 2d 56 (Me. 1974). *Michigan v. Tucker* says:

> "the suggested safeguards [in *Miranda*] were not intended to 'create a constitutional straightjacket,' but rather to provide practical reinforcement for the right against compulsory self-incrimination." 417 U. S. at 444.

The Fifth Amendment only forbids *compulsory* self-incrimination. *Michigan v. Tucker*, 417 U. S. at 444.

We now consider under what circumstances a statement is held to be compulsory in the constitutional sense. The historical origins of the privilege against compulsory self-incrimination are delineated in *Michigan v. Tucker*, 417 U. S. at 440:

> "The privilege against compulsory self-incrimination was developed by a painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. [Citations.] Certainly anyone who reads accounts of those investigations, which placed a premium on compelling subjects of the investigation to admit guilt from their own lips, cannot help but be sensitive to the Framers' desire to protect citizens against such compulsion."

While it was not merely these coercive practices at which *Miranda* was aimed, *Miranda* indicated that the nature of such practices led to its decision. 384 U. S. at 445. The practices criticized were directed at subjecting defendants to extensive, and many times elaborate, psychological interrogation and physical threats of coercion, as well as brutality—"beating, hanging and whipping—and sustained and protracted questioning incommunicado." 384 U. S. at 446. Furthermore, in each of the four cases before the Court, the majority found the defendant had been

> "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." 384 U. S. at 457.

Here, Williams was not subjected to psychological interrogation; he was not physically threatened; and he most certainly was not "run through menacing police interro-

gation procedures." Yet *Miranda's* ritual seems to require that once he requested counsel, was advised to be silent, and said he would tell the whole story when he got to Des Moines and saw his lawyer, nothing he thereafter said to police could be used against him. It may have been "King's X" from then on. The *Miranda* remedy is sometimes analogous to using a shotgun to kill a fly—the cure is worse than the disease. Certainly that is true in this case.

First, there is no evidence that Williams was at any time physically abused. Captain Leaming reassured Williams that he would not be physically abused (A. p. 80). Next, it is uncontradicted that Williams was aware he had counsel awaiting him in Des Moines (A. pp. 55, 91), and that such counsel initially advised Williams he would have to tell where the body was (A. p. 96). Williams also had at least two private meetings with an attorney in Davenport (A. pp. 44, 75), and he had a private conference with a municipal court judge there (A. p. 43). It is inconceivable that Williams could have felt that he was being subjected to menacing, coercive police interrogation under these facts and *he never said he was.*

Williams had been given the "*Miranda* warnings" on three separate occasions before leaving Davenport (A. pp. 48, 49, 55), including once in the presence of his attorney, Kelly, by one of the officers, Leaming, who transported him to Des Moines (A. p. 55). Shortly after leaving Davenport Leaming even told Williams he did not want to discuss the facts (A. p. 81), thus re-emphasizing that Williams knew he did not have to talk to Leaming or anyone else. Any conversations between Leaming and

Williams, prior to Leaming's "Christian burial" statement, were spontaneously initiated by Williams (A. p. 79).

It was at least two hours after Leaming's "Christian burial" statement that Williams asked about the shoes and blanket (A. pp. 63, 81). Reference to the body itself was made even later. Even then Williams' statement as to the location of the body was not in response to any questioning by law enforcement officers (A. p. 84). Williams *freely* directed the police to the little girl's body (A. p. 85). Finally, what Leaming said about a "Christian burial" and his hunch that the body was located near Mitchellville was said only once, soon after leaving Davenport (A. pp. 63, 64). Such statements were not "menacing." They were not even questions.

The wrongs on which *Miranda* arose were simply not present in this case. We ask, as did Judge Henry Friendly of the Second Circuit:

> "Granted that none of these suspects should be compelled to speak by the thumbscrew or the rack, does not the overriding social interest lie in encouraging them to do so by any proper means rather than in placing every imaginable difficulty in the way of interrogation?" Henry J. Friendly, *Benchmarks,* page 278 (1967).

Williams' statements simply were not "compelled." They were volunteered. 31 A. L. R. 3rd 565, 676-680 and cases cited.

Under *Miranda* custodial interrogations are ordinarily inherently compelling. Indeed, many veteran detectives today believe there is no longer any real opportunity for lawful in-custody interrogation. Justice Walter V. Schaefer has written: "The privilege against self-incrim-

ination as presently interpreted precludes the effective questioning of persons suspected of crime." *Police Interrogation and the Privilege Against Self-Incrimination*, 61 Nw. U. L. Rev. 506, 520 (1966). (*Miranda*, of course, has never stopped *un*lawful interrogation by a policeman willing to lie. See Justice Harlan's dissent in *Miranda*, 384 U. S. at 516.) *Miranda* stressed the importance of the "nature and setting" of the in-custody interrogation. 384 U. S. at 445. Read in conjunction with *Michigan v. Tucker*, *supra*, it now seems that in-custody interrogations are *not* necessarily inherently compelling. In *Tucker*, after comparing the facts in the case with the "historical circumstances underlying the privilege against compulsory self-incrimination." 417 U. S. at 444, the Court stated:

> "Certainly no one could contend that the interrogation faced by respondent bore any resemblance to the historical practices at which the right against compulsory self-incrimiation was aimed." 417 U. S. at 444.

While some suspects may give compelled statements when subjected to in-custody interrogation, such statements should not be viewed as inherently compelled.

> "Not *every* person in custody is 'swept from familiar surroundings, surrounded by antagonistic faces and subjected' to unfair techniques of persuasion . . ." Friendly, Benchmarks, at 272. (Emphasis added.)

In fact, many suspects nowadays defiantly spit in the "pig" officer's face.

The privilege against compulsory self-incrimination was intended to prohibit the psychological interrogation and physical threats of compulsion referred to in *Michigan v. Tucker*, 417 U. S. at 440. In the absence of such compulsion, a failure to completely comply with the prophylactic standards of *Miranda* should not justify the *per se* finding of a Fifth Amendment violation.

18 USC § 3501

The *Miranda* dogma seems to have sprung in part from actual practices of the Federal Bureau of Investigation (384 U. S. at 483 to 486) whose director and agents we submit may have copied them from the detectives of Scotland Yard as portrayed in old movies. Upon solving the crime, movie buffs will remember that the British officer always calmly informed the suspect: "Of course you have a right to counsel and anything you say from this moment may be used against you." Decent chaps these British. But they do not exclude *voluntary* confessions which they obtain without their "caution." 384 U. S. 488 and 522. The majority in *Miranda* suggests that of the known civilized world, confessions obtained by police interrogation are actually excluded only in Scotland, India, and Ceylon. 384 U. S. 488-489. Justice Harlan points to a major exception in India and Ceylon: "if evidence is uncovered by police questioning, it is fully admissible at trial along with the confession itself, so far as it relates to the evidence and is not blatently coerced." 384 U. S. 522. And Justice Harlan also notes that Scotland's limits on interrogation nevertheless permit the judge to make restrained comment at trial on the defendant's failure to take the stand. Cf. *Griffin v. California*, 380 U. S. 609 (1965). (Incidentally, prior to *Griffin*, we prosecutors in Iowa could properly comment upon a defendant's refusal to take the stand and ask the

jury such rather obvious questions as "Ladies and gentlemen, who knows better than the defendant where he was on that awful night? The victim can't help you. She's dead. But does the defendant tell you? No, he chooses to remain inscrutable as he has every right to do, although innocence commands that he speak and his silence is consistent with guilt." Now, thanks to *Griffin,* we are too civilized to resort to such deplorable tactics which would allegedly "compel" a defendant to incriminate himself in the courtroom.

Congress saw nearly at once that the *Miranda* warnings were not sound. On May 24, 1968, less than two years after *Miranda,* the United States Senate voted 72 to 4 to make voluntary confessions and self-incriminating statements admissible provided only that they were "voluntarily given." The House of Representatives concurred on June 6, 1968, by a vote of 368 to 17, and President Johnson signed the act into law on June 19, 1968.

Thus, 18 USC § 3501 (Public Law 90-31) provided (and still does) in pertinent part:

> "In any criminal prosecution brought by the United States or by the District of Columbia, a confession [of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing] *shall be admissible in evidence if it is voluntarily given.* * * *" (Emphasis added.)
>
> * * *
>
> "The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if

> it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> "The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession." *See Addendum A to this brief,* p. 76.

It is ironic that Congress has so relieved federal officers, in federal cases of the *Miranda* standards when *Miranda* was based in part upon the practice of those very officers. Federal officers are relieved but state officers bound. Only this court, or a Constitutional amendment can relieve the states from *Miranda's* requirements. As J. Edward Lumbard, Chief Judge of the Second Circuit said in 1967 in a speech to the Conference of Judges at Honolulu: "The Court has imbedded [the *Miranda* rule] in the concrete of constitutional construction and it can be blasted out only by an overruling decision . . . or by constitutional amendment."

Some federal courts have already applied the 1968 statute to federal cases. *United States v. Crocker,* 510 F. 2d 1129 (10th Cir. 1975); *United States v. Gegax,* 506 F. 2d 460 (9th Cir. 1974); *United States v. Vigo,* 487 F. 2d

295 (2nd Cir. 1973); *United States v. Pond and Fanelli*, 382 F. Supp. 556 (SDNY 1974).

In *United States v. Crocker, supra*, a criminal prosecution in the United States District Court in Oklahoma, the Court held it was not error in determining voluntariness of confession to apply the guidelines of 18 U. S. C. § 3501 and said, quite succinctly:

> "We have held that voluntariness is the sole constitutional requisite governing the admission of a confession in evidence. United States v. McCormick, 468 F. 2d 68 (10th Cir. 1972), cert. denied 410 U. S. 927, 93 S. Ct. 1361, 35 L. Ed. 2d 588 (1973); United States v. Davis, 456 F. 2d 1192 (10th Cir. 1972)."

And on the basis of *Michigan v. Tucker, supra*, at least two state cases, *State v. Statewright*, 300 So. 2d 674 (Fla. 1974) and *People v. Dean*, 39 C. A. 3rd 875, 114 Cal. Rptr. 555 (1974) have seemingly adopted a "totality of circumstances" test.

We urge a totality of circumstances test in which the circumstances are prescribed as in 18 USC § 3501, which was the second of five titles to the Omnibus Crime Control and Safe Streets Act of 1968. As we have noted, that act passed with 440 senators and congressmen voting for it and only 21 against—over 95%. Doubtless the Omnibus Crime Bill was a compromise but the purpose of the bill was to stop crime in the streets of America. It has never been fully implemented by all states who were authorized therein to enact wiretapping. Nor has there been a decision of this court supporting 18 USC § 3501. *Miranda* suggested that Congress and the states "are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." 384 US at 490.

Obviously, the safeguards of 18 USC § 3501 are not quite as fully effective as those in *Miranda* which practically eliminate in-custody interrogation. But they are effective and honor the time-tested standard of voluntariness. That is why we ask that *Miranda* be overturned. The police interrogation in this case, if it can truly be called that, would almost certainly be held to meet the test of voluntariness if the five circumstances enumerated in § 3501 are applied.

Williams knew he was suspected of murder when he turned himself into the police at Davenport. He was immediately advised of his rights and allowed to phone his attorney in Des Moines. Within two hours he was arraigned. He had at least two private meetings with an attorney he consulted at Davenport. Before he left Davenport he had been advised of his *Miranda* rights on at least three separate occasions. He understood that he had a right to remain silent. Of course, he was without the assistance of either of his lawyers when he made his spontaneous statements and took police to Pamela's body, perhaps in violation of their directions to him. A pretrial suppression hearing was held and the statements were found to be admissible by an Iowa District Court Judge.

If Williams was as religious as he is made out to be, that fact should add to the trustworthiness of his statements. "If temporal hopes exist, they may lead to falsehood. Spiritual hopes can lead only to truth." 3 Wig-

more, Evidence § 840 p. 840 (Chadbourn Revision 1970), citing from Joy, Confessions 51 (1843).

It is doubtful that Williams would have been convicted seven years ago, not to mention today, without those statements. Someone murdered Pamela Powers and there has never been a hint of suggestion of any other suspect. If *Miranda* is strictly applied to this case, it will make a mockery of justice.

Certainly, this Court is well aware that we are not alone in our conviction that *Miranda* goes too far. In the additional view of Messrs. Jaworski, Malone, Powell and Story, at page 303 of *The Challenge of Crime in a Free Society*, a report by the President's Commission on Law Enforcement and Administration of Justice, 1967, the foregoing commissioners noted:

> "But the broadened rights and resulting restraints upon law enforcement which have had the *greatest impact* are those derived from the Fifth Amendment privilege against self-incrimination and the Sixth Amendment assurance of counsel." (Emphasis added.)
>
> "The two cases which have caused the *greatest concern* are *Escobedo v. Illinois and Miranda v. Arizona* * * *." (Emphasis added.)
>
> "Although the full meaning of the code of conduct prescribed by *Miranda* remains for future case-by-case delineation, there can be little doubt that its effect upon police interrogation and the use of confessions will drastically change procedures long considered by law enforcement officials to be indispensable to the effective functioning of our system. Indeed, one of the great State Chief Justices has described the situation as a 'mounting crisis' in the constitutional rules that 'reach out to govern police interrogation.'" (Referring in a footnote to Chief Justice Traynor.)

* * *

> "The impact of *Miranda* on the use of confessions is an equally serious problem. Indeed, this is the other side of the coin. If interrogations are muted there will be no confessions; if they are tainted, resulting confessions—as well as other related evidence—will be excluded or the convictions subsequently set aside. There is real reason for concern, expressed by dissenting justices, that Miranda in effect proscribes the use of all confessions. [Citing Mr. Justice White, joined by Mr. Justice Harlan and Mr. Justice Stewart, 384 U. S. at 538.] This would be the most far-reaching departure from precedent and established practice in the history of our criminal law."

"The Challenge" at page 306 goes on:

> "Until *Escobedo* and *Miranda* the basic test of admissibility of a confession was whether it was genuinely voluntary. Nor had there been any serious question as to the desirable role of confessions, lawfully obtained, in the criminal process. The generally accepted view had been that stated in an early Supreme Court case:
>
> > '*[T]he admissions or confessions of a prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence.*'
>
> "It is, of course, true that the danger of abuse and the difficulty of determining 'voluntariness' have long and properly concerned the courts. Yet, one wonders whether these acknowledged difficulties justify the loss at this point in our history of a type of evidence considered both so reliable and so vital to law enforcement."

Moreover, Dean John Henry Wigmore, more than 25 years before *Miranda*, wrote:

> "The privilege has . . . been so extended in application beyond its previous limits as almost to be incredible, certainly to defy common sense . . . courts should unite to keep the privilege strictly within the limits dictated by historic fact, cool reasoning and sound policy."

Concurring in *Griffin v. California*, 380 U. S. 609, 617 (1965) Mr. Justice Harlan expressed "the hope that the court will eventually return to constitutional paths which, until recently, it has followed throughout its history."

At least except as we have heretofore noted from *Miranda* about the limiting effects on police interrogation in England, Scotland, India and Ceylon, most countries of the world allow their police almost complete freedom in interrogating suspects. Few countries have anything comparable to our Bill of Rights, and certainly to our Fifth Amendment. No other nation on earth besides ours bars absolutely from evidence a defendant's voluntary statement. Evidence resulting from wrongly obtained confessions is as admissible in Australia (and in England) as any other evidence, if it is relevant and voluntarily obtained, even though steps may be taken to punish by other process the persons guilty of illegally obtaining it. *Cross and Wilkins on Evidence*, London, 1964, p. 161.

Indeed, Mr. Justice Benjamin Cardozo said of the privilege against self-incrimination:

> "This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its

> scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. . . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry?" *Palko v. Connecticut*, 302 U. S. 319, 325-26 (1937).

We would not for the moment suggest that the Fifth Amendment be abolished or that anyone should, to use the precise words of the amendment "be compelled in any criminal case to be a witness against himself." Nor do we think anyone should be compelled to be a witness against himself *before* any criminal case, at least absent immunity from use of the evidence against him. But we do implore this Court to reconsider and overturn *Miranda* in favor of the more recent reasonable rule so overwhelmingly enacted by the Congress for the federal courts eight years ago. 18 USC § 3501, Addendum A. And we do confess to equally as strong feelings about this as those expressed by Justice Musmanno in his dissent in *Commonwealth v. Banks*, 429 Pa. 53, 239 A. 2d 416, 419 (1968) handed down the day before his death.

The Exclusionary Rule Attacked

The United States Supreme Court did not apply the exclusionary rule to illegally obtained evidence to state courts until *Mapp v. Ohio*, 367 U. S. 643 (1961). Thereafter, state courts, as federal courts, were required to blind themselves to overwhelmingly persuasive evidence found in the possession of a defendant by unlawful means. Thus in many if not most such cases the defendant, and always the officer, went unpunished for their transgressions. Only the victims, their families and loved ones, and society, were made to suffer for the defend-

ant's crime and the policeman's often very technical violations of rights. "The criminal is to go free because the constable has blundered" Judge Cardozo noted in *People v. Defore,* 242 N. Y. 13, 21, 150 N. E. 585, 587 and "Society [is deprived] of its remedy against one lawbreaker because he has been pursued by another." Justice Jackson in *Irvine v. California,* 347 U. S. 128, 136 (1954). See also 8 Wigmore on Evidence, (3rd ed.) § 2184, p. 40.

While private litigants may use illegally obtained evidence, the people cannot.

Criminals are the *only* real beneficiaries of the exclusionary rule. The rights of innocent citizens are very rarely protected by it. As a consequence felons are frequently permitted to roam at large in our society and repeat their crimes upon helpless victims simply because officers made mistakes in tracking them down.

Is it any wonder that our officers and prosecutors today simply throw up their hands and give up? Even the most dedicated policeman who, prior to the exclusionary rule, would relentlessly track a suspect through the bitter cold of a winter evening will now simply seek a warm cafe in which to have a cup of hot coffee because he knows that even if he gets his man he'll have to tell him to shut up and ignore the heroin in his grip.

We submit that the President's Commission on Law Enforcement and Administration of Justice, the Omnibus Crime Control and Safe Streets Act of 1968 and all of the millions expended by the Law Enforcement Administration Agency (LEAA) have not made things one whit better. There are more crimes and criminals in our society today than ever before. The liberals' answers to the problem have been a disaster—a disaster which was predicted by experienced and dedicated prosecutors and law enforcement officials throughout our land ever since it was first decided that the exclusionary rule was the way to stop violations of the rights of our people. We in the heartland of America ask this Court to reassess the situation and give a little less emphasis to rights and a little more to duty.

Trickery and Deceit

Historically, neither our courts nor out citizens have been offended by the use of a little trickery or deceit as long as it has not been of such a nature as to induce a false confession. What is really wrong with tricking man into telling the truth? That is one of the goals of a good Perry Mason type cross-examination.

It has been held that a valid confession may be obtained by leading the subject to believe there is more proof of his guilt than actually exists. *People v. Thompson,* 133 Cal. App. 2d 4, 284 P. 2d 39 (1955). For example, it used to be that a defendant could be told that his fingerprints were found at the scene of a crime when, in fact, they had not been. *People v Connelly,* 195 Cal. 584, 234 Pac. 374 (1925); *Lewis v. United States,* 74 F. 2d 173 (9th Cir. 1934). And the interrogator used to be able to deceive a suspect into believing that his accomplice had confessed and implicated both himself and the suspect. *Osborn v. People,* 83 Colo. 4, 262 Pac. 892 (1927); *State v. Palko,* 121 Conn. 669, 186 Atl. 657 (1936) and *Commonwealth v. Green,* 302 Mass. 547, 20 N. E. 2d 417 (1939), in which the accused was shown a faked telegram

purporting to come from another police department and revealing that an accomplice had confessed.

Before *Miranda* warnings were required it had been held permissible for an investigator to pose as a fellow prisoner, or even as a friend of the suspect, and a confession obtained as a result of such trickery was admissible. *People v. White,* 176 N. Y. 331, 68 N. E. 630 (1903). Perhaps such trickery as this is still allowed even now, although *cf. Massiah v. United States,* 377 U. S. 201 (1964).

There are of course tricks which should not be tolerated such as an investigator posing as an attorney for the suspect, because a suspect has a right to believe in the attorney-client privilege. *People v. Barker,* 60 Mich. 277, 27 N. W. 539 (1886). But it was held permissible for a police officer to pose as a witness to a crime and "identify" the suspect as the perpetrator in *United States v. Murphy,* 227 F. 2d 698 (2nd Cir. 1955).

A previously sanctioned tactic was that of an investigator to make false notes purporting to come from one prisoner to another and thereby eventually procuring a statement in the handwriting of the other admitting his guilt. *State v. Dingledine,* 135 Ohio St. 251, 30 N. E. 2d 660 (1939). And a confession's admissibility has been considered unaffected by the fact that the interrogation of a murder suspect is not told that his victim has died from his act but is questioned only about the act itself. *Commonwealth v. Johnson,* 372 Pa. 266, 93 A. 2d 691 (1953).

All of these practices involved a degree of trickery or deceit which, prior to *Miranda,* might have been allowed except as noted. Ordinarily, the innocent cannot be tricked or deceived into confessing a crime they did not commit. Nowadays, people stand up and cheer at certain tactics used by Kojac, McCloud and Columbo, not to mention John Wayne who asked in *True Grit,* "How do you serve a writ on a rat?"

Let's find some substitute for excluding relevant and persuasive evidence. Let's take the handcuffs off the police and put them on the criminals.

Division II

Can an accused waive his Sixth Amendment right to counsel in absence of counsel previously retained who had advised the accused to remain silent?

The decision reached by the federal district court and accepted by the Eighth Circuit Court of Appeals in this case creates a *per se* right to counsel rule: once an accused has counsel, he cannot effectively waive his right to counsel for purposes of interrogation, absent presence of (or notice to) counsel (Supp. App. F, Pet. for Cert. p. A15 and App. A, Pet. for Cert. p. A14).

The facts relied on by the Courts below in making this determination are:

1. The police violated an alleged agreement they had with Attorney McKnight that Williams would not be questioned before consultation with Mr. McKnight in Des Moines, but which agreement the police deny was ever made.

2. The fact that Attorney Kelly had been denied his request to accompany Williams to Des Moines, which request Captain Leaming denied Kelly made.

3. An interpretation of the statement by Williams "when I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story" as meaning a request to remain silent until in the presence of counsel.

This Court's decisions in *Massiah v. United States,* 377 U. S. 201 (1964), *Escobedo v. Illinois,* 378 U. S. 478 (1964); and *Miranda v. Arizona,* 384 U. S. 436 (1966) are the foundation upon which the *per se* rule of waiver of counsel is based. *United States v. Durham,* 475 F. 2d 208 (7th Cir. 1973); *United States v. Wedra,* 343 F. Supp. 1183 (S. D. N. Y. 1972); *United States ex rel. Magoon v. Reincke,* 416 F. 2d 69 (2d Cir. 1969). See also footnote 3, *Mathies v. United States,* 374 F. 2d 312 (D. C. Cir. 1967), wherein (now) Chief Justice Burger stated "[t]he prospective application of *Miranda* . . . plainly will require that such interviews can be conducted only after counsel has been given an opportunity to be present." 374 F. 2d at 315 (n. 3).

Massiah could not have waived his right to counsel because he did not know his incriminating statements were being overheard by law enforcement officers who were using an electronic device to eavesdrop on his conversation with his friend who was wired by police for sound. The crucial point was the acquisition of incriminating information by police from an unsuspecting accused. Under those circumstances the accused could not effectively exercise or waive his right to the lawyer he had already retained.

Although Mr. Justice White in his dissent envisioned that *Massiah* would mean all admissions would be deemed involuntary if made outside the presence of counsel (377 U. S. at 210) several courts have refused to extend the decision to the point where no valid waiver can be made in counsel's absence, after counsel is retained. *United States v. Anderson,* (5th Cir., filed November 28, 1975), 18 Cr. L. 2265; *Moore v. Wolff,* 495 F. 2d 35 (8th Cir. 1974); *United States v. Springer,* 460 F. 2d 1344 (7th Cir. 1972), *cert. denied,* 409 U. S. 873 (1973); *United States v. Crisp,* 435 F. 2d 354 (7th Cir. 1971), *cert. denied,* 402 U. S. 947 (1971); *United States v. Garcia,* 377 F. 2d 321 (2d Cir. 1967); *Stowers v. United States,* 351 F. 2d 301 (9th Cir. 1965).

Judge Hanson's reliance upon *Escobedo v. Illinois,* 378 U. S. 478 (1964) as establishing a *per se* counsel waiver rule is also misplaced. First, *Escobedo* indicated that "the accused may, of course, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pre-trial stage or at the trial." 378 U. S. at 490, footnote 14. Secondly, this Court has consistently held since *Johnson v. New Jersey,* 384 U. S. 719 (1966), that *Escobedo* is not to be broadly extended beyond the facts of that particular case. *Frazier v. Cupp,* 394 U. S. 731 (1969); *Michigan v. Tucker,* 417 U. S. 433 (1974).

This case clearly does not come within the narrow confines of *Escobedo* because: (1) Williams was effectively advised of his absolute right to remain silent, and (2) it is straining to interpret Williams' statement, "When I get to Des Moines and see Mr. McKnight, I

am going to tell you the whole story," as a request to consult with his lawyer before saying any more.

Aside from these particular factual differences, the police conduct in *Escobedo* was markedly different than in the instant case. In *Escobedo,* a police officer who grew up in Escobedo's neighborhood, assured Escobedo that he and his sister would be allowed to go home and that they would only be witnesses if they made a statement against Di Gerlando, a confederate. Further, while denying continual requests from both Escobedo and his attorney to talk to each other, the police told Escobedo his lawyer did not want to talk to him. Escobedo was also told by the police that they had convincing evidence he had fired the fatal shot.

The compelling atmosphere in *Escobedo* was just not present in the case at bar. Williams was assured and reminded that his attorney was waiting for him in Des Moines (A. pp. 51, 91). Williams knew and understood his rights and had been advised by two attorneys not to talk until he returned to Des Moines and saw Attorney McKnight. The doctrine of *Escobedo* should not control the outcome of this case.

Nothing in *Miranda v. Arizona,* 384 U. S. 436 (1966) suggests that an accused cannot make a valid waiver absent the presence or knowledge of his counsel. To the contrary, the Court stated:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a *heavy burden* rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U. S. at 475. (Emphasis added.)

As stated in *Moore v. Wolff, supra*:

> "If an accused can voluntarily, knowingly, and intelligently waive his right to counsel before one has been appointed, there seems no compelling reason to hold that he may not voluntarily, knowingly, and intelligently waive his right to have counsel present at an interrogation after counsel has been appointed." 495 F. 2d at 37.

Further, *Miranda* expressly provides that volunteered statements are admissible. 384 U. S. at 478. See also 31 A. L. R. 3rd 565, 676.

The constitutional right to counsel is inherently a personal right, one that belongs only to the accused. It is his decision, once he is adequately aware of the right, whether he wishes to avail himself of the privilege to have counsel or whether he will waive that privilege. If an accused can waive his Sixth Amendment right to assistance of counsel at trial, *Faretta v. California,* 95 S. Ct. 2525 (1975), it seems only logical that he can waive right to counsel for purposes of interrogation.

The facts relied on by the Courts below must be closely scrutinized to determine this critical issue. While the state district court found that an agreement did exist between the police and Mr. McKnight not to question Williams until he was returned to Des Moines and in the presence of Attorney McKnight, the facts are certainly not clear. Captain Leaming emphatically denies the existence of any agreement (A. p. 54). Chief of Police Nichols testified "there was no specific agreement made as far as a hard and fast agreement, you will not ask him

anything, he will not tell you anything, except Mr. McKnight, over the telephone to Mr. Williams, stated, 'We will talk when you get here.' " (A. p. 40).

It appears that at the suppression hearing the state district court found an agreement between the police and Attorney McKnight based on the advice Mr. McKnight gave Williams during their telephone conversation. Because Chief Nichols and Captain Leaming overheard Attorney McKnight's end of the conversation, state district judge Denato apparently concluded they became bound by Mr. McKnight's advice to his client, when they said nothing. While the finding had an agreement did exist between the police and Mr. McKnight is questionable, the existence and purported violation of it could not prevent Williams from ever effectively waiving his rights. Nor did it require Officers Leaming and Nelson to plug their ears on the trip back from Davenport.

Regardless of the existence of the agreement, a violation of that agreement does not rise to a constitutional deprivation of right to counsel. Even if the agreement was broken, and Williams was "interrogated" on the trip to Des Moines, he did not lose the ability to make an effective waiver. Counsel cannot make a binding contractual agreement with police to limit his client's prerogative to *either* assert or waive his *client's* constitutional right. *Cf., Brookhart v. Janis,* 384 U. S. 1 (1966). It is Williams' rights with which we are concerned here—not Mr. McKnight's.

The record is devoid of any evidence that Williams was told by the officers that he must submit to questioning without his attorney present. Williams knew that

both Attorney McKnight and Attorney Kelly had told him to remain silent. After being given three separate *Miranda* warnings, he also knew and understood he didn't have to answer any questions until he was with his attorney in Des Moines. The vital question to be determined is whether Williams was deprived of a constitutional safeguard. An incident that occurs between the police and counsel, without more, could not affect Williams' ability to control his personal constitutional right.

The same rationale should apply to the disputed fact that Attorney Kelly was denied permission to accompany Williams to Des Moines. It is significant that the request, if it came at all, came from Kelly and not Williams. Nothing in the record indicates that Williams desired to have Kelly with him. Again, the constitutional right to counsel belonged to Williams, not Kelly. It was Williams' decision to either assert or waive it. Counsel could not do it for him.

The Sixth Amendment does not require that an attorney be with his client whenever the attorney feels it is necessary. If the accused is fully aware of the right, the bare fact that counsel isn't present cannot affect the ability of the accused to effectively waive the right.

This Court, in deciding the issue of standing to invoke a constitutional right, has stated that constitutional rights are personal and may not be asserted vicariously. *Broadrick v. Oklahoma,* 413 U. S. 601 (1973); *Alderman v. United States,* 394 U. S. 165 (1969). While this case does not present a standing issue, this principle enunciated by the Court has direct application.

What would Kelly have done had he gone along except insist that Williams shut up? And if Williams persisted, would it have been Kelly's duty to physically silence him? Suppose, on approaching the Mitchellville turnoff, Williams suddenly blurted, as he actually did, "I am going to show you where the body is." We suppose Kelly would have insisted, "Oh, no you're not—drive on," in which case Pamela might not have been found under the snow for months. That may have been Kelly's *duty*, like it or not.

The Sixth Amendment privilege to counsel must necessarily be the right of the criminal accused to be afforded counsel when the *accused* deems it necessary. *Cf., Faretta v. California*, 95 S. Ct. 2525 (1975).

The heavy reliance of the lower courts on the alleged broken agreement and the purported denial to counsel in determining that Williams could not effectively waive his right to counsel absent counsel's presence, contravenes the fundamental personal nature of the right to counsel. To so hold destroys the long standing test of waiver: whether the accused himself "intentionally relinquished or abandoned a known right or privilege." *Johnson v. Zerbst*, 304 U. S. 458 (1938).

Although the third factor relied on by the Courts below—Williams' statement, "When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story,"—necessarily includes a Fifth Amendment question, the lower Courts consider it critical in finding a violation of a Sixth Amendment privilege.

The decisions below, in interpreting the statement made by Williams as an assertion that he would make no

statements until he was in Des Moines with his attorney, McKnight, are suggesting that once a request for counsel is made by an accused and he subsequently gives incriminating statements absent the presence of his counsel, those statements must be excluded—regardless of the surrounding circumstances.

Initially, as stated by Judge Webster in his dissent in the Eighth Circuit, the phrase "When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story," is ambiguous on its face. The statement of the accused in *Frazier v. Cupp*, 394 U. S. 731 (1969), "I think I had better get a lawyer before I talk any more. I am going to get in trouble more than I am now," 394 U. S. at 738, is clearly less ambiguous than the statement of Williams. In *Frazier*, the Court said, "it is possible that the questioning officer took petitioner's remark not as a request that interrogation cease but merely as a passing comment." 394 U. S. at 739. While the facts in *Frazier* were pre-*Miranda*, and the Court said, "We might agree [with Petitioner's claim of Sixth Amendment violation] were *Miranda* applicable to this case, . . .", 394 U. S. at 738, it is important in assessing the meaning of Williams' statements. As in *Frazier*, Williams had demonstrated his willingness to talk to Captain Leaming (A. pp. 56, 57, 81). It is possible that Captain Leaming interpreted Williams' "when I get to Des Moines" statements as no more than passing comments.

Another critical factor ignored by the federal courts is the timing of the statements of Williams. Captain Leaming's "Christian burial" statement, his theory that the body was near Mitchellville, and the suggestion they

stop and locate the body, occurred shortly after they turned onto I-80 and headed for Des Moines (A. p. 63). This statement was made only once (A. pp. 63, 64). But it was the only "interrogation" mentioned by the federal courts (although it appears they obviously suspected there was more).

The record does not indicate *when* Williams made his statements, "When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." Nothing in the record tells us whether these statements occurred before or after Leaming's "Christian burial" statement. But one such statement "came not too long after we got on the freeway." (A. p. 65). That was about the time Leaming made his "Christian burial" statement (A. p. 63).

The lower Courts attached no significance to the time sequence of the statements. Without knowing when Williams' "when I get to Des Moines" statements occurred, it is impossible to determine with certainty that the dictates of *Miranda* were violated. 384 U. S. at 474.

In *Michigan v. Mosley,* 96 S. Ct. 321 (1975), a police officer was permitted to interrogate a suspect who had earlier invoked his right to remain silent during questioning by another officer. The court held he could subsequently waive a right he had previously invoked and that the later waiver did not *per se* violate his *Miranda* rights after he was warned again. *Mosley* is narrowly drawn to apply only to the right of an accused who has earlier invoked his right to remain silent. The question of whether or not *Miranda* requires a *per se* exclusion of incriminating statements made by an accused after he has indicated a desire to see his attorney (and not merely his

right to remain silent) was left unanswered in *Mosley.* The Court refused to extend *Miranda's* requirement that "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U. S. at 473-474.

Mosley held that the foregoing passage from *Miranda* did not require that any statement taken after a suspect invokes his privilege must be excluded from evidence as the product of compulsion, even if volunteered by the person in custody without any further interrogation. *Mosley* said a blanket prohibition against the taking of voluntary statements regardless of the circumstances would transform *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity and deprive suspects of an opportunity to make informed and intelligent assessments of their interests at a later time. No particular interval of waiting time is specified in *Mosley,* although the second officer did not attempt to question *Mosley* for two hours after he had invoked his privilege.

Applying this rationale, a *per se* proscription against further inquiry after an accused's request for counsel need not be adopted. But here, Williams had counsel and his "when I get back to Des Moines" statements should not have been considered a request for such.

While in *Mosley,* a second officer advised Mosley of his rights before resuming questioning, here Williams had three times been informed of his rights. We submit that is enough.

Many courts have held that repeated warnings are not necessary to a finding that a defendant, with full knowledge of his rights, knowingly and intelligently waived them. *Biddy v. Diamond,* 516 F. 2d 118 (5th Cir. 1975); *United States v. Anthony,* 474 F. 2d 770 (5th Cir. 1973); *United States v. Osterburg,* 423 F. 2d 704 (9th Cir. 1970), *cert. denied,* 399 U. S. 914 (1970); *Miller v. United States,* 396 F. 2d 492 (8th Cir. 1968), *cert. denied,* 393 U. S. 1031 (1969).

Mr. Justice White, in his concurring opinion in *Mosley,* indicates that the Court in *Miranda* did, in fact, create a *per se* rule against further interrogation after an assertion of the right to counsel. 96 S. Ct. at 329.

We submit that *Miranda* should not be read to mean that an accused can never effectively waive his constitutional right to counsel absent presence of counsel. Even after assertion of his right to counsel, he may very well make a voluntary, knowing and intelligent waiver. Interrogation is not then foreclosed merely because counsel has been retained or requested.

The facts of this case justify the conclusion by Mr. Justice White:

> "There is little support in the law or common-sense for the proposition that an informed waiver of a right may be ineffective even where voluntarily made." *Michigan v. Mosley, supra* at 328.

The proper inquiry is whether the prosecution has met its burden of establishing the accused was fully informed of and understood his rights and whether, having once exercised them, he can later change his mind and knowingly and understandingly waive them, whatever the

rights are. The following cases hold he can later waive his rights: *United States v. Cavallino,* 498 F. 2d 1200 (5th Cir. 1974); *United States v. Anthony,* 474 F. 2d 770 (5th Cir. 1973); *United States v. Collins,* 462 F. 2d 792 (2d Cir. 1972), *cert. denied,* 409 U. S. 988 (1972). And even though an attorney has been requested or retained, the right to an attorney can be subsequently waived. *Biddy v. Diamond,* 516 F. 2d 118 (5th Cir. 1975); *United States v. Dority,* 487 F. 2d 846 (6th Cir. 1973); *United States v. Springer,* 460 F. 2d 1344 (7th Cir. 1972), *cert. denied,* 409 U. S. 873 (1973); *United States v. Brown,* 459 F. 2d 319 (5th Cir. 1972), *cert. denied,* 409 U. S. 864 (1973); *Coughlan v. United States,* 391 F. 2d 371 (9th Cir. 1968), *cert. denied,* 393 U. S. 870 (1968).

Thus we contend the federal courts erred in concluding Williams could not, and did not, waive his right to the presence of counsel. Not only would a *per se* no waiver rule erode the fundamental personal nature of a constitutional privilege, such a rule would effectively exclude all confessions, as indicated at the beginning of Division I, in the face of society's burgeoning crime problem. Valuable and trustworthy evidence could be lost forever because police would not be able to take an otherwise voluntary statement from an informed accused whose counsel was not present (or notified) when his client desired to confess.

Mr. Justice Jackson, concurring in the result in *Watts v. Indiana,* 338 U. S. 49 (1949), stated the problem confronting our criminal justice system:

> To subject one without counsel to questioning which may and is intended to convict him, is a real peril

to individual freedom. To bring in a lawyer means a real peril to solution of the crime because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." 338 U. S. at 59.

Division III

Did the federal courts err in ignoring relevant evidence from which the jury and the Iowa Supreme Court could and did properly infer that accused waived his Fifth and Sixth Amendment rights?

The Federal District Court and the Circuit Court found that *no* facts exist to support the finding of the Iowa Supreme Court that Williams waived his constitutional rights. Relying on the language of *Miranda*—" . . . a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained," 384 U. S. at 436—the federal courts here ignore clear facts that demonstrate an effective waiver of rights. While waiver may not be presumed from silence, express words of waiver are not necessary. *Hughes v. Swenson,* 452 F. 2d 866 (8th Cir. 1971); *United States v. Hilliker,* 436 F. 2d 101 (9th Cir. 1971), *cert. denied,* 401 U. S. 958 (1971); *United States v. Ganter,* 436 F. 2d 364 (7th Cir. 1970); *United States v. Montos,* 421 F. 2d 215 (5th Cir. 1970), *cert. denied,* 397 U. S. 1022 (1970); *Bond v. United States,* 397 F. 2d 162 (10th Cir. 1968), *cert. denied,* 393 U. S. 1935 (1969).

The definition of waiver, "an intentional relinquishment or abandonment of a known right or privilege" has remained unchanged since the Court's decision in *Johnson v. Zerbst,* 304 U. S. 458 (1938). Especially since the decision in *Miranda,* state and federal courts have been struggling with the question of what facts indicate that an accused voluntarily, knowingly, and intelligently waived his constitutional rights. It is well settled, however, that the issue of waiver must depend, in each case, on all the facts and circumstances. *Johnson v. Zerbst, supra; Escobedo v. Illinois,* 378 U. S. 478 (1964); *United States v. Harden,* 480 F. 2d 649 (8th Cir. 1973).

There is no dispute that Williams was given full *Miranda* warnings on three separate occasions: by Lieutenant Ackerman of the Davenport police, by Judge Metcalf of the municipal bench of Davenport, and by Captain Leaming shortly before starting the trip to Des Moines (A. pp. 42, 106, 55).

There is no question that Williams understood his rights; he expressly stated that he did (A. pp. 49, 50, 75). Moreover, Williams exercised his known right to counsel. He spoke to Attorney McKnight via telephone and had at least two private conferences with Attorney Kelly in Davenport (A. pp. 44, 46, 75, 76). It has been held that an exercise of a known constitutional right is significant evidence in the determination of a valid waiver. *United States v. Cobbs,* 481 F. 2d 196 (3rd Cir. 1973), *cert. denied,* 414 U. S. 980 (1973); *United States v. Brown,* 459 F. 2d 319 (5th Cir. 1972), *cert. denied,* 409 U. S. 864, *reh. denied,* 409 U. S. 1119 (1972).

Attorney McKnight had advised Williams to say nothing until he returned to Des Moines. Further, Attorney Kelly had instructed him to remain silent, and, according to Williams at the suppression hearing, Kelly told the police that Williams wouldn't be talking to them until he returned to Des Moines (A. p. 47). Thus, Williams was completely aware of his rights and had received advice on what he should do.

The record reveals that soon after leaving Davenport, Williams began talking to Captain Leaming, disregarding the advice he received from counsel (A. pp. 79-81). Williams not only asked questions of Leaming concerning general subjects, he also asked direct questions dealing with the police investigation of the disappearance and death of Pamelo Powers. Williams asked Leaming if he (Leaming) hated him and wanted to kill him (A. p. 79). Further, he inquired if the police had checked his room for fingerprints, and if they had questioned his friends or searched their homes (A. pp. 56, 81). By initiating conversations concerning the crime, it seems apparent that Williams was willing to talk freely with the police, even though he had been advised to say nothing and he knew he did not have to talk. When an accused, having been fully advised of his rights, actively seeks to speak with the police about matters under criminal investigation, incriminating statements should not be excludable, the accused having indicated a clear intention to waive his rights. *Holloway v. United States,* 495 F. 2d 835 (10th Cir. 1974); *United States v. Cobbs, supra; United States v. Hopkins,* 433 F. 2d 1041 (5th Cir. 1970), *cert. denied,* 401 U. S. 1013 (1971).

Sometime *after* Williams had initiated the preceding conversations, Captain Leaming made his "Christian burial" statement heretofore repeatedly referred to (A. p. 81).

There is no evidence that indicates that statements made by Williams resulted from "interrogation" by either officer. On the contrary, the evidence is definite that prior to Williams' statement about the body, no questions were being asked him. Further, there has been no discussion whatsoever concerning the shoes and blanket; none, that is, until Williams suddenly asked about them. Leaming testified he asked no questions about the blanket because he thought it had already been found (A. p. 62).

An examination of the entire record points to a spirit of cooperation by Williams. He voluntarily surrendered in Iowa, after being told by Attorney McKnight that his return to Des Moines could be delayed if he surrendered in Illinois (A. p. 88). He talked freely to Leaming about the police investigation of the death of Pamela Powers, a discussion started by Williams. As they approached the vicinity where Williams deposited the shoes and the blanket, he asked the officers if those items had been found. Both questions by Williams were unsolicited. Again, as they neared the Mitchellville exit, Williams told the officers that he would take them to the body. In each instance, Williams, completely on his own, directed the officers to the place he disposed of the shoes, the blanket, and the body. In addition to McKnight instructing Williams that he was to make no statements until he arrived in Des Moines, McKnight also told Williams:

> ". . . You have to tell the officers where the body is. . . . You have got to tell them where she is. It makes

> no difference, you have got to tell them, you have already been on national hook-up. . . . " (A. p. 96).

Thus, even before Williams saw Captain Leaming and before Leaming made the statement about stopping to locate the body, Williams had been advised by his attorney and may well have believed he was going to have to take the police to the body.

Ignoring this extensive evidence of a knowing and intelligent waiver, the federal courts below relied on a strained construction of Williams' "when I get to Des Moines and see my attorney" statement, and other facts not found persuasive by the jury or the Iowa Supreme Court, to find that no waiver was possible.

The Federal District Court found that Leaming, in effect, "lied to" or "tricked" Williams by telling him the body was in the Mitchellville area, a fact Leaming didn't actually know, and thus induced Williams to tell him where the body was (Supp. Appendix F, Pet. for Cert. p. A8). Leaming *had* expressed his theory to Williams that the body was somewhere near Mitchellville (A. p. 61). But Williams knew Leaming was just speculating; he so testified (A. pp. 47, 48). After all, Leaming hadn't been with Williams when he had disposed of Pamela's body. Perhaps Judge Hanson thought Williams might not have verified Leaming's hunch had the guess been wrong and that Williams should have had an "equal" chance to escape a less intuitive officer. In any case, it seems to us that this circumstance is no different than confronting a suspect with the true known evidence against him. When a suspected fact turns out to be true, the only difference it makes is that instead of laughing the suspect winces.

This has not been deemed offensive even when the police misstate or falsely represent the state of the evidence. *Frazier v. Cupp,* 394 U. S. 731 (1969); *Michigan v. Mosley,* 96 S. Ct. 321 (1975).

The federal courts below also place considerable emphasis on the fact that Williams was an escapee from a mental institute. Other than the mere fact he was confined in a mental institute, there is absolutely no evidence that he was mentally incapacitated in any way. On the contrary, the Iowa District Court ordered an examination at an Iowa Mental Health Institute, and Williams was found to be competent and sane (A. p. 9). No evidence was introduced at trial to show otherwise.

We have previously discussed the alleged broken agreement between the police and Attorney McKnight not to question Williams until he returned to Des Moines, and the purported denial of Attorney Kelly's request to accompany Williams to Des Moines. These factors, if in fact they occurred, are actually irrelevant to the issue of whether Williams intentionally relinquished a known right. Waiver of constitutional rights should not be determined by a policeman's disregard of a request made by counsel. Whether or not a waiver occurs can only be determined by the circumstances of the questioning itself.

Regardless of whether Williams' "when I get to Des Moines," statements invoked his rights, he could thereafter change his mind and waive those rights previously exercised by those statements. *Biddy v. Diamond,* 516 F. 2d 118 (5th Cir. 1975); *United States v. Cavallino,* 498 F. 2d 1200 (5th Cir. 1974); *United States v. Dority,* 487 F. 2d 846 (6th Cir. 1973); *United States v. Collins,* 462

F. 2d 792 (2nd Cir. 1972), *cert. denied,* 409 U. S. 988 (1972); *United States v. Brown,* 459 F. 2d 319 (5th Cir. 1972), *cert. denied,* 409 U. S. 864, *reh. denied,* 409 U. S. 1119 (1973).

The federal courts' determination of no waiver was also based in part on the use of "subtle interrogation." (Appendix A, Pet. for Cert. p. A14). We concede that Captain Leaming wanted to find the body of Pamela Powers (A. pp. 92, 93) but his statement was hardly subtle. A true man of the cloth would more likely consider it a brickbat. *Miranda,* however, has not yet been construed to proscribe a play upon a murder suspect's religious conscience (See *Castleberry v. State,* 522 P. 2d 257 (Okla. 1974), *cert. denied,* 419 U. S. 1019 (1974)) or desire for decent burial. And we pray that it never will.

> "It seems difficult to imagine that a man under spiritual convictions and the influence of religious impressions would therefore confess himself guilty of a crime of which he was *not* guilty . . . Such spiritual convictions, or spiritual exhortations, stem from the nature of religion, the most likely of all motives to produce truth. They are therefore of a class entirely different from those that exclude confessions. A confession is excluded because the motive which induces it is calculated to produce untruth, because it is likely to lead to falsehood. If temporal hopes exist, they may lead to falsehood. Spiritual hopes can lead only to truth." 3 Wigmore, Evidence, § 840, p. 840 (Chadbourn Revision 1970), citing from Joy, Confession 51 (1842).

Religion has always played the leading role in maintaining order in every free society. Without it, our nation would flounder in hopeless oblivion.

And of all things that can never be held coercive, "subtle interrogation" must surely lead the list. For if it is subtle enough, the interrogated doesn't feel any coercion or compulsion at all.

We insist that Captain Leaming acted with signal ability in the highest tradition of police detection and that even had he resorted to singing "Bringing in the Sheaves" his splendid work should receive an award of merit rather than the condemnation of the courts.

Leaming's "psychological interrogation" is not akin to the kind of police questioning this Court has deemed repugnant. Compare the police interrogation in *Haynes v. Washington,* 373 U. S. 503 (1963); *Lynumn v. Illinois,* 372 U. S. 528 (1963); *Rogers v. Richmond,* 365 U. S. 534 (1961); *Blackburn v. Alabama,* 361 U. S. 199 (1960); *Spano v. New York,* 360 U. S. 315 (1959); *Ashcraft v. Tennessee,* 322 U. S. 143 (1944).

Williams testified at a pre-trial suppression of evidence hearing and again during an in-chambers hearing at trial. This testimony is set out in its entirety (A. pp. 46-53; pp. 67-91). Williams' main concern was for Attorney McKnight's health. Allegedly Leaming told him McKnight was having heart trouble and, because of the weather conditions, they should stop and locate the body on the way to Des Moines rather than subjecting McKnight to coming back to help find the body. Captain Leaming flatly denies making any such statements (A. pp. 61, 91), and no court has ever given Williams' allegation any credence. Further, Williams' claim of "psycho-religious" coercion loses credibility upon analysis of his testimony. Never does he even indicate that Leaming's

suggestion that the parents should be entitled to a Christian burial for the little girl influenced him to lead the police to the body.

> ([J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained until it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts,* 291 U. S. 97, at 122 (1934).

Division IV

Did the federal courts exceed their authority by disregarding the presumption of correctness given to state court written findings of fact by 28 U. S. C. § 2254 (d) and by making different findings of fact on disputed evidence contrary to the jury's verdict without an evidentiary hearing as required by Townsend v. Sain, 372 U. S. 293 (1963), despite a stipulation that the case be heard in U. S. District Court on the Iowa Supreme Court record?

Subject to certain limited exceptions, § 2254 (d) of Title 28 of the United States Code (See Addendum to this Brief, p. 78) provides that a federal court presumes as correct a written determination of a factual issue made by a state court. This section, added to 28 U. C. S. § 2254 by Congress in 1966, substantially codifies the rule in *Townsend v. Sain,* 372 U. S. 293, 318 (1963), that where the state court has conducted a full and fair evidentiary hearing and made express findings of fact, the federal district court may "and ordinarily should accept the facts as found in the hearing." Where a state court has conducted a full and fair hearing relating to alleged constitutional violations, the congressional purpose and intent under the statute is to require convincing evidence before a state finding of fact may be set aside. See, S. Rep. No. 1797, United States Code Congressional & Administrative News, p. 3363 (1966); *In Re Parker,* 423 F. 2d 1021, 1027 (8th Cir. 1970). As noted by Judge Webster, "To the extent that findings of fact were indisputably made by the state trial judge, those facts are to be taken as true unless they fall within the stated exceptions of 28 U. S. C. § 2254." (Petition for Writ of Certiorari, Appendix A, p. A15. And see, *In Re Parker, supra,* 423 F. 2d at 1024; *United States ex rel. Falconer v. Pate,* 319 F. Supp. 206 (N. D. Ill., E. D. 1970).

There is a good reason to presume a state trial court's resolution of facts as correct. The state court hears the witness testify and is best able to interpret the testimony and resolve conflicts or inconsistencies which may exist. As noted by Mr. Justice Jackson in a concurring opinion in *Brown v. Allen,* 344 U. S. 446, 535-536 (1953):

> "Of course, this Court never has considered itself foreclosed by a state court's decision as to the facts when that determination results in alleged denial of a federal right. But captious use of this power was restrained by observance of a rule, elementary in all appellate procedure, that the findings of fact on a trial are to be accepted by an appellate court in absence of clear showing of error. The trial court, seeing the demeanor of witnesses, hearing the parties, giving to each case far more time than an appellate court can give, is in a better position to unravel disputes of fact than is an appellate court on a printed transcript."

And see, Stidham v. Swenson, 506 F. 2d 478, 484 (8th Cir. 1974) (Gibson, J. dissenting); *United States ex rel. Falconer v. Pate,* supra, 319 F. Supp. at 208.

The Federal District Court, after reviewing the state record, concluded contrary to the state courts, that Williams did no waive his constitutional rights . To support this conclusion, the Court below places considerable emphasis upon a finding of fact that Williams asserted his right or desire not to talk to the police in the absence of his attorney. (Petition for Writ of Certiorari, Supplemental Appendix F, pp. A5, A13, A16, A18, A24, A27). This finding of fact by the Federal Court is based solely upon the Federal Court's interpretation of a statement made by a state witness during the motion to suppress hearing.

The record of the pre-trial hearing shows that Captain Leaming testified that Williams did not request the presence of counsel on the trip to Des Moines (A. p. 58). Leaming further testified:

> "He said on several times, 'When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story.'" (A. p. 58).

The Federal Courts below interpret this statement as a request by Williams for his counsel before giving information to the police.

A precise interpretation of this statement depends entirely upon the credibility and demeanor of the witness. Judge Webster points out this statement is "ambiguous on its face." He interprets the statement as an "assurance of cooperation" and not as an assertion of constitutional rights (Petition for Writ of Certiorari, Appendix A, p. A18). The entire record amply supports this interpretation. As demonstrated in detail in prior portions of this brief, this record is replete with evidence that Williams was more than willing to share information with the police authorities. On the other hand, the record is devoid of any clear indication that Williams preferred to talk only in the presence of his attorney.

It is significant in interpreting the true meaning of the statement that it was made by a state witness. Moreover, although Williams testified at the suppression hearing, nowhere does his testimony reflect in any way that he expressed a desire to have counsel present during the trip.

The state trial court, which heard Leaming testify did not interpret the statement as an assertion of constitutional rights. In fact, while the state court questioned the candor of Captain Leaming, it expressly found "an absence on the Defendant's part of any assertion of his right or desire not to give information absent the presence of his attorney . . ." (A. p. 1). On independent review of this record, the majority of the Iowa Supreme Court also was undisturbed by Leaming's testimony and relied upon the trial court's finding of fact (A. pp. 7-8, 9).

Both the Federal District Court and majority of the Eighth Circuit determined that the issue of waiver is a federal question. As such, the courts below assert they are obligated to make their own independent determination of the question. However, it is submitted that the federal court is constrained by 28 U. S. C. § 2254 (d) when deciding an ultimate constitutional question to defer to underlying historical facts fairly found in the state court.

As illustrated by the following footnote in *Re Parker, supra,* 423 F. 2d at 1027:

> "In most instances, whether a constitutional right has been denied will depend upon resolution of mixed questions of fact and law. For example, whether a confession is 'voluntary' might turn on the factual issue as to whether a defendant's testimony that he was physically beaten was true or whether the contradiction and denial of this alleged fact by law enforcement officials should be credited. Once this purely factual question is resolved, then the legal conclusion of 'voluntariness' remains. *It is the latter issue that a federal court must always review de novo and upon which a federal court must always make an independent determination. Townsend v. Sain, supra,* 372 U. S. at 318, 83 S. Ct. 745." (Emphasis added.)

The "latter issue" referred to above is the "legal conclusion," not the "purely factual question."

Similarly, the question whether an accused waives constitutional rights turns upon historical facts — the events which transpired between the authorities and the accused. It is the resolution of these "purely factual questions," as expressly determined by a state court, that are to be presumed correct by a federal court on habeas corpus review of a state conviction. *United States ex rel. Falconer v. Pate, supra* (application of § 2254 (d) presumption of correctness to facts showing waiver).

The Federal District Court disregarded the express finding of fact fairly made by the state court. It is suggested the Court below violated the clear mandate of 28 U. S. C. § 2254 (d) that such fact was to be presumed correct by the federal court. Especially where a recorded statement is not susceptible to clear interpretation, the

presumption should operate in favor of the state judge who heard the witness testify. It was error for the federal court to set aside this finding of fact made by the state court.

A distinct, but related, question is whether the Federal District Court should have conducted an evidentiary hearing under the circumstances of this case. This Court's decision of *Townsend v. Sain, supra,* 372 U. S. at 313, establishes those circumstances when, if present, a federal habeas court must conduct an evidentiary hearing:

> "If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

In Appendix A, Pet. for Cert. p. A2, it will be noted that "The attorneys for the parties agreed to submit the case to the District Court on the record of facts and proceedings in the state trial court."

The Eighth Circuit then went on to note that the district Court "in the exercise of its discretion, agreed to review appellee's petition based upon the state court records [citations]. The District Court *accordingly made its findings of fact,* upon which it based its order, without conducting further evidentiary hearings." (Emphasis added—*no* citations.)

While it is true that the parties stipulated that the record of facts and proceedings in the trial court be submitted as the record in the federal court, the parties, at least the petitioner here, certainly did not contemplate that any different findings of facts would be made by the federal court.

And when the district court goes on to say that "The following facts are unchallenged by either party:" (on p. A2), that is simply not true as we have repeatedly shown.

When the State stipulated that the case be submitted on the record of fact and proceedings in the trial court, the State assumed the findings of fact would not be changed, at least without an evidentiary hearing. See *Townsend v. Sain, supra,* and *In Re Parker, supra.* We now contend that the respondent is bound by the findings of fact in the state court which he agreed to submit to the District Court. He could have requested on evidentiary hearing hearing but he passed up the chance when he agreed to the stipulation.

Although *Townsend* extended to the habeas *applicant* a right to present evidence to the federal habeas court under these circumstances, it is clear the *state* as well as the applicant must be given the opportunity to present evidence relevant to disputed issues. *Townsend, supra,* 372 U. S. at 322. The state is on the "same footing" as the applicant to claim the right to an evidentiary hearing where the circumstances warrant that a hearing be held. *United States ex rel. McNair v. State of New Jersey,* 492 F. 2d 1307 (3d Cir. 1974). In *McNair,* the federal district court reviewed the state court record and, without conducting

an evidentiary hearing, issued a writ of habeas corpus. In concluding an evidentiary hearing was not warranted, (as both parties also concluded in this case when they agreed to submit it on the record), the federal court pointed to certain deficiencies in the state's case which were crucial to the constitutional issues presented. The Third Circuit remanded the case to the district court, holding that the state be afforded an opportunity to present evidence bearing upon the crucial facts found deficient in the record:

> ". . . When legal problems are presented which are not easily resolved even on the basis of clearly established facts, an evidentiary hearing is an *a fortiori* proposition if the state record is deficient in critical areas. There is no need here to make the task more difficult by struggling with a self-imposed blackout of relevant matters.
>
> "Furthermore, considerations of comity and proper respect for the state courts counsel against precipitous action to invalidate their judgment. If, when viewed against the backdrop of all the facts, the state court decision may be found to be correct, it should not be overturned because it is based on less than all the information which can be made available to the district court.
>
> "While it is true that the state bears some responsibility for the proper preparation of a record, nevertheless, the public interest requires that opportunity be given to present evidence which might show that the petitioner suffered no constitutional deprivation. In certain circumstances, *Townsend v. Sain,* mandates a hearing where the material facts were not adequately developed at the state court hearing. 28 U. S. C. § 2254 provides in part that a determination by a state court shall be presumed to be correct unless it appears that the material facts were not adequately developed in the state proceeding. Both the state and the petitioner stand on equal footing to claim this right."

United States ex rel. McNair v. State of New Jersey, 492 F. 2d at 1309.

Several considerations under *Townsend* and *McNair* point unavoidably to the conclusion that the District Court in this case should have conducted an evidentiary hearing before granting this writ of habeas corpus.

The Federal District Court resolved disputed facts, felt critical by the federal court in favor of Williams. The Court found that Leaming denied a request by Attorney Kelly to ride with Williams to Des Moines (Petition for Writ of Certiorari, Supplemental Appendix, pp. A5, A10). Kelly testified to that effect at trial (A. pp. 107-108). Captain Leaming unequivocally denied that Kelly requested to ride with Williams in the police car (A. pp. 55-56). Moreover, the Federal District Court found that Attorney Kelly told Captain Leaming that Williams was not to be questioned until he arrived at Des Moines (Petition for Writ of Certiorari, Supplemental Appendix, pp. A5, A10). Williams testified to that effect at the motion to suppress hearing (A. p. 47). Captain Leaming flatly denied that Kelly made the statement to him (A. p. 60).

The Federal District Court noted that a written finding of fact was not made by the state court concerning these disputed facts "apparently because [the state court] regarded it as irrelevant to the admissibility of the challenged evidence." (Petition for Writ of Certiorari, Supplemental Appendix, p. A10). The majority of the Eighth Circuit acknowledged that the record "reveals certain discrepancies between the testimony of Mr. Kelly and Detective Leaming and certain ambiguities in some of the testimony upon which the District Court relied in making its findings." (Petition for Writ of Certiorari, Appendix A,

p. A8). The majority further finds that "the state court did not resolve 'the merits of the factual disputes.'" (Petition for Writ of Certiorari, Appendix A, p. A8). But the State district court jury was properly instructed that before it could consider statements made by Williams, it must find that they were made voluntarily. This was a proper instruction and presumably the jury made that finding if Williams' statements were considered in convicting him.

Accordingly, as relates to resolution of these factual disputes, the Federal District Court was obligated under the *Townsend* criteria to conduct an evidentiary hearing before resolving these critical facts.

The Federal Trial Court also placed considerable emphasis on the fact that Captain Leaming knew Williams was a "deeply religious person" and used that knowledge to elicit incriminating statements (Petition for Writ of Certiorari, Supplemental Appendix pp. A5, A7, A24, A27). However, the only reference on which the federal court based its finding that Leaming knew Williams was a religious person is where Captain Leaming stated, in response to Williams' question asking Leaming if he hated him and wanted to kill him:

> " . . . Also advised him that I myself had had religious training and backbround as a child, and that I would probably come more near praying for him than I would to abuse or strike him. . . . " (A. p. 80).

This sole reference in the record does not warrant a finding that Captain Leaming "knew Williams was a deeply religious person." Moreover, there is absolutely nothing in this record to indicate, as the federal court would have us believe, that Captain Leaming's statement concerning

the discovery of the body (A. p. 81), was a direct result of such knowledge. .

The federal court, in effect, made the determination that Captain Leaming lied to or tricked Williams concerning his knowledge of the whereabouts of the body and that the lie had a compelling influence upon Williams to make the incriminating statements (Petition for Writ of Certiorari, Supplemental Appendix, pp. A8, A14, A27, A29). The entire record refutes the determination of the federal court on this point. Captain Leaming's belief that the body was in the Mitchellville area was merely his personal theory (A. pp. 60-61, 63, 65). Moreover, Williams knew that it was merely Leaming's theory. Williams testified at the suppression of evidence hearing that, " . . . he (Leaming) also mentioned they had some speculation that the body was near Mitchellville." (A. pp. 47-48). Certainly Captain Leaming did not know the exact location of the body, only Williams knew this. But to infer that Leaming lied to Williams and that Williams was influenced by the lie or trick is simply not supported by the testimony.

The Federal District Court notes that the timing of the conversation between Captain Leaming and Williams is not clear in this record. The federal court, however, resolves this deficiency in the record by saying the state carried the burden to "make timing clear if it was important." (Petition for Writ of Certiorari, Supplemental Appendix, p. A28). As demonstrated in earlier portions of this brief, the timing of statements between Williams and Captain Leaming is crucial to the final determination of these constitutional questions.

As previously shown, the Federal District Court interpreted an ambiguous statement in the cold record as an assertion of constitutional rights.

In *Townsend, supra,* 372 U.S. at 315-316, this Court recognized that where difficult legal problems are presented to a federal court and it is not clear that the state court would have granted relief if a defendant's allegations were believed, the federal court has no alternative but to hold a hearing to determine the facts:

> "If any combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation. The federal court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied. Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held."

The Federal District Court in this case could not properly "reconstruct" the facts from the cold record to support a conclusion that Williams' constitutional rights were violated. Although the federal court believed that the combination of facts as portrayed by Williams proved a violation of constitutional rights, the law when applied to the facts presents difficult legal questions. The Federal District Court was operating on the "purest speculation" as to how the facts relating to the alleged constitutional violations were resolved in the state court.

In addition to the fact that difficult legal problems were presented, the facts relied upon by the federal court

were not clear in the record. The *McNair* decision indicates that even when difficult legal problems are presented on the basis of "clearly established facts" an evidentiary hearing should be held by a federal court before overturning a state conviction. *McNair, supra,* 492 F. 2d at 1309. The facts relied upon by the Federal District Court in the instant case were not "clearly established" in the record. Both federal courts below admit the record is deficient in critical respects. As previously shown, the facts found by the federal court are either disputed facts, based upon ambiguous statements in the record, or simply unsupported. As the *McNair* court recognized, such "precipitous" action by a federal court should not result in overturning a state court's conviction because "less than all the information which can be made available to the district court" is presented to the court.

The discrepancies, ambiguities and disputes of record facts go directly to the ultimate issues in this case. To determine such important constitutional questions without the full benefit of completely developed facts seems to fly in the teeth of the *Townsend* and *McNair* decisions. If factual discrepancies and ambiguities exist that are crucial to the determination of the ultimate constitutional issues, more is required of a federal court than a study of the bare record before upsetting a state court's determination. Just as a federal court should not deny a writ of habeas corpus on less than clearly established facts, it should not overturn a state court conviction without providing an opportunity to the state to present evidence bearing upon critical facts which are not clear in the record.

When a state court has conducted a full hearing and decided the identical questions for review in a federal

court, "extreme caution" should be exercised by the federal court when determining factual questions without conducting an evidentiary hearing. *Iverson v. North Dakota,* 480 F. 2d 414, 426 (8th Cir. 1973). The lower court's treatment of the facts under the circumstances of this case raises serious questions concerning the role of a federal court on review of a state conviction. If federal courts are hereafter allowed to resolve facts in a similar fashion, there will be little purpose in having an original adjudication of federal rights in the state courts. J. Skelly Wright and Abraham D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility,* 75 Yale L. J. 895, 920-922 (May 1966).

Federalism, Comity and Abstention

In the official publication of the Analysis and Interpretation of the Constitution of the United States of America, published by the U. S. Government Printing Office to June 29, 1972, at page 767, we find the following:

> "*Conflicts of Jurisdiction: Rules of Accommodation*
>
> Federal courts primarily interfere with state courts in three ways: by enjoining proceedings in them, by issuing writs of *habeas corpus* to set aside convictions obtained in them, and by adjudicating cases removed from them. With regard to all three but particularly with regard to the first, there have been developed certain rules plus a statutory limitation designed to minimize needless conflict.
>
> *Comity.*—"[T]he notion of 'comity,'" Justice Black asserted, is composed of "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and

their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism, . . ." Comity is a self-imposed rule of judicial restraint whereby independent tribunals of concurrent or coordinate jurisdiction act to moderate the stresses of coexistence and to avoid collisions of authority. It is not a rule of law but "one of practice, convenience, and expediency" which persuades but does not command.

Abstention.—Perhaps the fullest expression of the concept of comity may be found in the abstention doctrine. The abstention doctrine instructs federal courts to abstain from exercising jurisdiction if applicable state law, which would be dispositive of the controversy, is unclear and a state court interpretation of the state law question might obviate the necessity of deciding a federal constitutional issue. Abstention is not proper, however, where the relevant state law is settled nor where it is clear that the state statute or action challenged is unconstitutional no matter how the state court construes state law. Federal jurisdiction is not ousted by abstention; rather it is postponed. Federal-state tensions would be ameliorated through federal-court deference to the concept that state courts were as adequate a protector of constitutional liberties as the federal courts and through the minimization of the likelihood that state programs would be thwarted by federal intercession. Federal courts would benefit because time and effort would not be expended in decision of difficult constitutional issues which might not require decision.

During the 1960's the abstention doctrine was in disfavor with the Supreme Court, suffering rejection in numerous cases, most of them civil rights and civil liberties cases. Time-consuming delays and piecemeal resolution of important questions were cited as a too-costly consequence of the doctrine. Actions brought

under the civil rights statutes seem not to be wholly subject to the doctrine and for awhile cases involving First Amendment expression guarantees seemed to be, as well, but this appears no longer to be necessarily the rule. While the Court has ordered abstention in several recent cases, it has made clear that abstention is proper "only in narrowly limited 'special circumstances,'" which are primarily limited to matters where state law is unclear, and it has directed that ordinarily a suitor's choice of a federal forum rather than a state court should be respected.

* * *" (Footnote citations omitted.)

We submit that perhaps it is time for this Court to consider extending the doctrines of federalism, comity and abstention to writs of habeas corpus filed after a criminal court conviction has been upheld by the highest appellate state court. Usually, such courts consist of several judges—in Iowa, for example, 9 justices sit on our state Supreme Court and they sit *en banc* in the more important cases. There is no reason to suppose that the collective wisdom of these 9 judges is inferior to that of a federal district judge, or even to a panel of 3 circuit court judges hearing an appeal from the federal district court.

For 50 years or more, state attorneys general have been plagued by repeated post-conviction habeas corpus proceedings, hearings and appeals therefrom both in state and in federal courts. There seems to be no end to litigation in a given criminal case. Some defendants have had four complete rounds of post-conviction procedures through all state and federal courts.

Every man is entitled to his day in court but there is no actual federally protected constitutional right to an

appeal from a conviction in a state criminal case. Indeed, it has not been a hundred years that when a man committed murder one day and was captured the next, he was tried on the third day and hanged on the fourth. And that was with due process of law, including judge, jury, defense counsel and all. Of course errors were made, perhaps some of them grievous, and innocent men were executed. But there is little clear and convincing proof, that, as a whole, justice cannot ordinarily be achieved in such a system. And surely, one appeal is enough. We do not ask that the pendulum swing back to the days of the past but only that some post-appeal limitations be invoked.

The National Association of Attorneys General has been trying to get Congress to act in this area for more than 25 years. That Association's court test of the federal habeas corpus act proved fruitless in *United States v. Hendricks*, 213 F. 2d 922 (3rd Cir. 1954), *cert. denied*, 348 U. S. 851, although 40 attorneys general joined Pennsylvania on the brief.

The right to appeal state criminal court convictions springs from state constitutions and statutes. So, too, the right to petition for writ of habeas corpus or to appeal to the United States Supreme Court, arises from statute.

In *Younger v. Harris*, 401 U. S. 37 (1971) the Supreme Court held that the federal courts should not invoke federal jurisdiction to enjoin enforcement of a state criminal prosecution, even where First Amendment rights might be violated under a state statute which appeared unconstitutional on its face, particularly in absence of extraordinary circumstances in which irreparable injury could be shown. We think that the Court should consider extending its reluctance to interfere with pending state prosecutions to *most* state criminal cases in which a conviction has been upheld by the state's highest appellate court. See 401 U. S. at 44.

We also note that in *Rizzo v. Goode*, 44 L. W. 4095, decided on January 21, 1976, the Court extended the principles of federalism to a mayor and police commissioner in the executive branch of city government and denied a federal court's legal power to supervise the functioning of the police department of the City of Philadelphia.

If this Court has power to adopt legislative type rules to stop harassment of defendants by law enforcement officers, as it did in *Miranda*, perhaps it has power to adopt rules to stop harassment of law enforcement officers by defendants. Justice should operate in both directions.

———o———

CONCLUSION

The oft-challenged doctrine of *Miranda v. Arizona*, 384 U. S. 436 (1966) should now be disapproved and it should be held that the Respondent Williams waived his Fifth and Sixth Amendment Rights to silence and counsel, after having retained counsel who had advised him to remain silent.

It should also be held that the federal courts erred in ignoring relevant evidence from which the jury and the Iowa Supreme Court could and did properly infer that the accused had waived his Fifth and Sixth Amendment Rights.

It should also be held that the federal courts exceeded their authority by disregarding the presumption of correctness given to state court written findings of fact by § 28 U. S. C. § 2254 (d) and by making findings of fact obviously contrary to the jury's verdict on disputed evidence without an evidentiary hearings as required by *Townsend v. Sain*, 372 U. S. 293 (1963).

Incidental to the last finding, we ask this Court to consider restricting the use of the writ of habeas corpus in federal courts to review criminal convictions of the Iowa Supreme Court, or our highest state appellate court.

Finally, for all of these reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Attorney General of Iowa,

RICHARD N. WINDERS,
Assistant Attorney General of Iowa,

Attorneys for Petitioners.

ADDENDUM A

Constitutional Provisions

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Constitution of the United States, Amendment XIV:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws."

Statutes

Title 18 U. S. C. § 3501, Omnibus Crime Control and Safe Streets Act of 1968:

"§ 3501. Admissibility of confessions

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

"(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

"The presence or absence of any of the above-mentioned factors to be taken into consideration by

the judge need not be conclusive on the issue of voluntariness of the confession.

"(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offense against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided,* That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

"(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

"(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

"Added Pub. L. 90-351, Title II, § 701 (a), June 19, 1968, 82 Stat. 210, and amended Pub. L. 90-578, Title III § 301 (a) (3), Oct. 17, 1968, 82 Stat. 1115."

Title 28 U. S. C. § 2254 (d):

"In any proceeding instituted in a Federal court by an applicant for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State Court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

———o———

CERTIFICATE OF SERVICE

I, Richard N. Winders, Assistant Attorney General for the State of Iowa, hereby certify that on the 11th day of February, 1976, I mailed three (3) printed copies of BRIEF OF PETITIONER, correct 1st class postage prepaid, to:

Mr. Robert Bartels
University of Colorado
School of Law
Fleming Law Building
Boulder, Colorado 80302

I further certify that all parties required to be served have been served.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1263

LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,

Petitioner,

v.

ROBERT ANTHONY WILLIAMS, a/k/a ANTHONY ERTHEL WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The Brief for Petitioner (p. 1) cites the District Court opinion incorrectly. The correct citation is 375 F.Supp. 170 (S.D. Ia. 1974).

QUESTIONS PRESENTED

1. Can an accused waive his Sixth and Fourteenth Amendment right to the assistance of counsel when he is interrogated by police officers in an automobile in the absence of and without notice to his retained counsel, in the face of instructions that the accused should not be questioned until he reaches counsel, after the denial of a request by counsel to be with the accused, after statements by the accused that he will provide information after seeing his attorney, and in violation of an agreement with counsel that the accused would not be questioned in the absence of counsel?

2. Did the District Court and Court of Appeals ignore evidence demonstrating a waiver by Respondent of his Fifth and Sixth Amendment rights?

3. Should this Court overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), in this case?

4. Did the District Court and the Court of Appeals (a) violate the presumption of correctness given to state court findings of fact by 28 U.S.C. §2254(d), and (b) abuse their discretion by not holding an evidentiary hearing when the parties stipulated to submit the case on the state court record?

5. Should the above issues be reached when an independent ground which was fully litigated and adjudicated below, but which Petitioner has failed to raise in his petition to this Court, disposes of this case?

SUMMARY OF ARGUMENT

A. The judgments of the lower courts in this action included a decision on the merits that Respondent made the statements at issue herein involuntarily. Petitioner has not raised this voluntariness issue in his petition for certiorari. Ordinarily, this Court does not reach for issues that the parties have not presented by way of a petition or cross-petition, and this case does not fall within any exception to that general rule. The voluntariness issue disposes of this case in Respondent's favor independently of the issues that have been raised by Petitioner, and those issues therefore need not be reached by this Court.

B. The police officers involved in this case interrogated Respondent during an automobile trip with the specific purpose of obtaining as much incriminating information as possible from him before he could consult with his previously retained attorney—despite several statements by Respondent, by counsel, and by another police officer that Respondent did not wish to provide any information about the crime until he saw his attorney, and despite an agreement with counsel that the police would not question Respondent during the automobile trip. This conduct was designed to and did deprive Respondent of the assistance of his counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

C. Given the circumstances set out above, there is no question of "waiver" involved. And in any event, Petitioner has produced no evidence to meet his heavy burden of overcoming the presumption against a knowing, intelligent, and intentional waiver of Respondent's right to counsel, or to outweigh the strong evidence in this case *against* waiver.

D. In addition, the conduct of the detectives in this case violated *Miranda v. Arizona*, 384 U.S. 436 (1966), in at least two ways. First, the detectives ignored numerous indications that Respondent wished to have his attorney present when he made any statements and

purposefully continued interrogation in counsel's absence. Second, in continuing this interrogation the detectives failed to honor (scrupulously or otherwise) several indications that Respondent wished to remain silent during the automobile trip. The detectives also failed to repeat *Miranda* warnings when they asked Respondent questions about the location of the victim's shoes. All of these violations were willful attempts to circumvent Respondent's Fifth and Sixth Amendment rights.

E. Because the constitutional violations in this case do not depend on the *Miranda* guidelines, this is not an appropriate case in which to consider overruling or modifying *Miranda*. Moreover, neither the facts of the case nor the history of enforcement of *Miranda* justifies a departure from the constitutional standards enunciated in that decision or from the principle of *stare decisis*.

F. The District Court and Court of Appeals scrupulously observed the presumption of correctness given to state court findings of fact by 28 U.S.C. §2254(d). While the federal courts below properly made independent determinations of the constitutional issues presented, neither made findings of fact that conflict with the findings of the state trial court. Moreover, neither the District Court nor the Court of Appeals abused its discretion in deciding this case on the basis of the state court record, especially in light of the agreement of the parties that the District Court should do so and the failure of Petitioner to raise this issue in the Court of Appeals.

STATEMENT OF THE CASE

Although Petitioner's Statement of the Case is for the most part accurate, it does omit some facts that are

of importance to this case, and includes many others that are irrelevant. The following summary will attempt only to give an outline of the relevant facts in order to provide some overall context for the following discussion of the legal issues; more detailed analysis of the record will be given when relevant to particular points.

On December 24, 1968, ten year old Pamela Powers disappeared while with her family at the Des Moines, Iowa, YMCA; a search was quickly instituted for her. Subsequently, suspicion focused on Respondent, and the Des Moines police began to look for him in connection with the girl's disappearance. (Supp. App. to Pet.,[1] p. A2; App.[2] 37, 74). A warrant for Respondent's arrest on a charge of "child-stealing" was filed in Polk County. (App. 42).

On December 26, 1968, Respondent telephoned a Des Moines attorney, Mr. Henry T. McKnight, from Rock Island, Illinois. On Mr. McKnight's advice, Respondent then surrendered himself to the Davenport, Iowa, police. (App. 42, 46, 70). Lieutenant Ackerman of the Davenport police department gave Respondent *Miranda* warnings but did not question him after Respondent indicated that he did not wish to make any statement in the absence of Mr. McKnight. (App. 42-43, 45).

Meanwhile, Mr. McKnight went to the Des Moines police department to discuss Respondent's surrender. Mr. McKnight spoke to Chief Wendell Nichols and Detective Cleatus Leaming. While Mr. McKnight was at the police station, Respondent telephoned him from the Davenport police station. (App. 37, 38, 54). In the

[1] "Supp. App. to Pet." refers to the "Supplemental Appendix" to the petition for a writ of certiorari.

[2] "App." refers to the Single Appendix.

presence of Chief Nichols and Detective Leaming, Mr. McKnight told Respondent that he would not be mistreated or grilled, and that he should not make any statements until he reached Des Moines. (App. 38, 70). Detective Leaming testified at trial that he heard Mr. McKnight tell Respondent, *inter alia*, that he would have to disclose where the victim's body was, and that this would be done when Respondent returned to Des Moines by Respondent's telling Mr. McKnight and Mr. McKnight's relaying the information to the police. (App. 96). It was arranged that Detective Leaming would drive to Davenport to pick up Respondent and return him directly to Des Moines. (App. 38, 39, 90). At this time, there was an agreement between Mr. McKnight and the Des Moines police that Respondent would not be questioned during the automobile trip from Davenport to Des Moines. (App. 1, 2).

Following his telephone call to Mr. McKnight, Respondent was arraigned in Davenport on the Polk County child-stealing warrant; the arraigning judge advised Respondent of his constitutional rights. (App. 43, 106). Respondent then consulted with Mr. Thomas Kelly, Jr., a local attorney,[3] who subsequently informed the Davenport police that Respondent wished to remain silent. (App. 43-44, 73).

At about 9:30 A.M. on December 26, Detective Leaming and Detective Arthur Nelson of the Des Moines police department left Des Moines by automobile; they arrived in Davenport shortly before noon. (App. 44, 55). At about 1:00 P.M., Detective Leaming and Detective Nelson were introduced to Respondent

[3] Respondent testified that he consulted with Mr. Kelly "because he was the only Negro present." (App. 47).

and to Mr. Kelly. (App. 74-75). Detective Leaming gave Respondent *Miranda* warnings; he then told Respondent that they would be "visiting" during the ride back to Des Moines. (App. 55, 75). Following the warnings, Respondent asked to confer with Mr. Kelly again. (App. 75). After this conference with Respondent, Mr. Kelly, whom Detective Leaming understood to be acting as Respondent's counsel, informed Detective Leaming that Respondent should not be questioned until he saw Mr. McKnight (App. 107); Mr. Kelly also stated that he would ride to Des Moines with Respondent "to make sure his rights are protected," but Detective Leaming refused this request. (App. 107-108).[4]

With his hands cuffed behind his back, Respondent was placed in a police car with Detective Nelson and Detective Leaming. (App. 77, 83). During the return trip to Des Moines, Detective Leaming and Respondent did "visit". At the outset, Detective Leaming and Respondent discussed religion, Respondent's reputation, whether the police had searched for fingerprints in Respondent's room, police procedures, organizing youth groups, singing, and a number of other topics. (App. 79-81). During their conversation, Respondent told Detective Leaming that he would tell "the whole story" after Respondent saw his attorney, Mr. McKnight, in Des Moines. This statement was repeated on several occasions during the trip. (App. 58, 65). In the face of these statements, Detective Leaming admitted that he

[4] Detective Leaming denied these statements, but the District Court found that they were made, Supp. App. to Pet., p. A10, 375 F.Supp. at 176, and the Court of Appeals approved this finding, App. to Pet., pp. A7-A8, 509 F. 2d at 231. The record on this question is discussed in Part V, *infra*.

tried to get as much incriminating information as he could from Respondent before they "got back to McKnight." (App. 60, 61, 95). In particular, Detective Leaming, who knew that Respondent was a religious person (App. 63, 80, 81) and an escapee from a mental institution (App. 92, 95), turned the conversation from the topics mentioned above to a direct attempt to obtain information about the crime with which Respondent had been charged:

> Eventually, as we were traveling along there, I said to Mr. Williams that, 'I want to give you something to think about while we're traveling down the road.' I said, 'Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we should stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.'

(App. 81; see also App. 63). Respondent then asked why Detective Leaming felt that they were going by the body, and Detective Leaming stated that he knew the body was somewhere in the area of Mitchellville, a town near Interstate 80 and about 15 miles from Des Moines. Detective Leaming then stated: "I do not want you to answer me. I don't want to discuss it any

further. Just think about it as we're riding down the road." (App. 81).

Some time later, "quite a ways" east of the Grinnell exit on Interstate 80, Respondent asked whether the police had found the victim's shoes. (App. 99, 100). After some further conversation about the shoes, Detectives Leaming and Nelson asked Respondent if he had placed the boots with the other articles of clothing; Respondent replied that he had not, and that the shoes were behind a gas station at the Grinnell exit. (App. 81-82, 99-100). Detective Leaming then asked what kind of shoes they were, and Respondent replied that they were brown leather boots. (App. 82). Subsequently, as the car approached the Grinnell exit, Detective Nelson asked Respondent which of the gas stations at that exit was the one in question, and Respondent directed him to a Skelly station. (App. 100).

At the gas station in Grinnell, Detective Nelson asked Respondent where the shoes would be; Respondent answered that they would be behind the restaurant part of the gas station in an old box. (App. 72, 100). However, the shoes were not found. (App. 82-83, 100).

After the detectives and Respondent left the gas station, Respondent asked whether the blanket had been found, and Detective Leaming asked whether it was with "the other stuff." (App. 62, 83-84). After further conversation about this, the three men stopped at a rest stop. Upon discovering that the blanket had already been found there, they returned to the freeway. (App. 83-84). At some point east of the Mitchellville exit, after further conversation between Detective Leaming and Respondent about "people and religion and intelligence and friends of his, and what people's opinion was of him and so forth," Respondent asked Detective Leaming how he knew the body was near

Mitchellville. Detective Leaming responded that that was his job; Respondent then stated that he would show the officers where the body was. (App. 63). Subsequently, Respondent directed detectives Leaming and Nelson to the victim's body (App. 57, 101-103).

During the automobile trip, Respondent was not warned of his constitutional rights (App. 92), and no attempt was made to inform Respondent's counsel that the officers were attempting to obtain information from Respondent or that Respondent was providing such information (App. 93). However, a highway patrol car following the detectives' car was equipped with a state-wide radio that was used to inform Captain Nichols of the Des Moines police department of the progress of the automobile trip. (App. 39, 66). After his return to Des Moines and a conference with Mr. McKnight, Respondent provided no further information about the crime. (App. 95).

ARGUMENT

I.

THE UNCHALLENGED DECISION OF THE LOWER COURTS THAT RESPONDENT'S STATEMENTS WERE INVOLUNTARY DISPOSES OF THIS CASE, AND THE QUESTIONS PRESENTED BY PETITIONER THEREFORE SHOULD NOT BE REACHED.

In addition to holding that Respondent's Fifth, Sixth, and Fourteenth Amendment rights were violated under *Massiah v. U.S.*, 377 U.S. 201 (1963), *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), the District Court held that

Respondent's statements during the automobile trip to Des Moines were involuntary. Supp. App. to Pet., pp. A25-A29, 375 F.Supp. 170, 183-85 (S.D. Ia. 1974). Petitioner raised this issue in the Eighth Circuit Court of Appeals, but that court affirmed the District Court decision. App. A to Pet., p. A15, 509 F.2d 227, 234 (8th Cir. 1975). Petitioner's petition for certiorari in this Court, however, did not raise the voluntariness issue that was litigated and decided against Petitioner below; and this issue also was not included in the Statement of Issues in the Brief for Petitioner.[5]

In this case, the decision in Respondent's favor on the voluntariness issue disposes of the entire case and requires reversal of Respondent's conviction, regardless of what resolution may be made of the issues raised in the petition for certiorari. Thus, even if this Court were to reach and decide adversely to Respondent all of the issues raised in the petition, the decisions of the lower courts would not be overturned.

This Court has repeatedly held that its review of a case ordinarily is limited to the questions presented in the petition for certiorari. *See, e.g., Strunk v. U.S.*, 412 U.S. 434, 437 (1973); *U.S. v. O'Brien*, 391 U.S. 367,

[5] As Judge Webster recognized in his dissent in the Court of Appeals, the issues of waiver and voluntariness, though factually related, are clearly distinct. App. A. to Pet., p. A19, 509 F.2d at 236. As litigated below and presented in this Court by Petitioner, the issue of waiver involves whether Respondent knowingly, intelligently, and intentionally relinquished his right to counsel and his right to remain silent before making the statements that are at issue in this case. On the other hand, the voluntariness question centers on whether these statements were the product of Respondent's own free will or the product of outside influences (in this instance, primarily Detective Leaming's conduct). *See, Schneckloth v. Bustamante*, 412 U.S. 218 (1973); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

386, n.1 (1968); *Mazer v. Stein*, 347 U.S. 201, 208 (1954); *Irvine v. California*, 347 U.S. 128, 129 (1954); *see also, McCullough v. Kammerer Corp.*, 323 U.S. 327, 328 (1945); Rule 23(1)(c), Rules of the United States Supreme Court. "We do not reach for constitutional questions not raised by the parties." *Mazer v. Stein, supra*, at 206, n.5. This rule may not be followed in some very exceptional circumstances, such as when there is "plain error" below that disposes of the case. *See, Stevens v. Marks*, 383 U.S. 234, 246-47 (1966); *Kessler v. Strecker*, 307 U.S. 22, 34 (1939). In this case, however, there is no such exceptional reason for this Court to search beyond the questions presented by the State for additional constitutional issues that have been fairly litigated and consistently decided below. The District Court's decision that Respondent's statements were involuntary is amply supported by the record; the basis for that decision is well articulated in that court's opinion. Supp. App. to Pet., pp. A25-A29, 375 F.Supp. at 183-85. As the District Court held, there were "many factors pointing strongly to involuntariness, and the State simply failed to meet its burden of showing voluntariness." Supp. App. to Pet., p. A29, 375 F.Supp. at 185.

Given this posture of the case, this Court can and should affirm on the basis of the unchallenged lower court decisions that Respondent's statements were involuntary, without reaching the issues raised in the petition.

II.

RESPONDENT'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF HIS COUNSEL WAS VIOLATED IN THIS CASE.

A. Detective Leaming's Conduct Deprived Respondent of the Effective Assistance of his Retained Counsel.

Both the District Court and the Court of Appeals in this case held that Detective Leaming's conduct during the automobile trip from Davenport to Des Moines violated Respondent's Sixth and Fourteenth Amendment right to the effective assistance of counsel. These holdings were made independently of the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). Supp. App. to Pet., pp. A11-A16, 375 F.Supp. at 179-81; App. to Pet., pp. A14-A15, 509 F.2d at 234.

No constitutional right of a person accused of crime is more fundamental than the right to have the assistance of counsel in meeting the efforts of police and prosecutor to obtain a conviction.[6] *See, Powell v. Ala-*

[6] Petitioner does not question that the automobile trip from Davenport to Des Moines was a "critical stage" during which Respondent had a right to the assistance of counsel. A warrant had been filed for Respondent's arrest; he had been arrested and booked; he had been formally arraigned before a magistrate on the warrant; he was in custody; prosecutorial efforts had focused on him; the police knew that he had actually retained counsel; and Detective Leaming admittedly engaged in an effort to obtain information from him that could have been—and was—used against him at trial. Clearly, the "adverse positions of government and defendant [had] solidified," *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); and the automobile trip was the kind of critical state in which "potential substantial prejudice to defendant's rights inheres in the particular confrontation," *Coleman v. Alabama*, 399 U.S. 1, 7 (1970), and in which the assistance of counsel is needed to protect the defendant's interests vis-a-vis the trial itself. *See also, Massiah v. United States*, 377 U.S. 201 (1964).

bama, 287 U.S. 45, 68-69 (1932). As both of the lower court opinions indicate, the facts demonstrating a violation of the right to counsel (and of fundamental fairness) in this case are legion. Most significantly, the police not only knew that Respondent had obtained and was represented by counsel—the state trial court also found that "an agreement was made between defense counsel and the police officials to the effect that [Respondent] was not to be questioned on the return trip to Des Moines; rather, that he would talk to police officials, with his attorney, on arrival in Des Moines." (App. 1). Petitioner now seems to question this finding, despite his own references to the presumption of correctness to be given to state court factual determinations under 28 U.S.C. §2254(d). But while the agreement may not have been "contractual" in a commercial, offer-acceptance-consideration sense (see Brief for Petitioner, p. 40), the record clearly supports the state court's conclusion that when detectives Leaming and Nelson left Des Moines for Davenport, there was a mutual agreement between the police and Mr. McKnight that the police would bring Respondent straight back to Des Moines without interrogating him. (See App. 33, 35, 38, 39, 41, 64-65, 90). This is particularly apparent in light of the state court's opportunity to observe the witnesses and its explicit doubts about Detective Leaming's "complete candor" during his testimony about the agreement. (App. 2).

Even without this agreement between Mr. McKnight and the police, the facts in this case would demonstrate a violation of Respondent's right to the assistance of counsel. First, Lieutenant Ackerman of the Davenport Police Department testified that he told the Des Moines police on the morning of the day on which the automobile trip took place that Respondent did not wish to

make any statement about the crime until he saw his attorney, Mr. McKnight.[7] (App. 43, 54). Second, the Des Moines police, including Detective Leaming, knew that Mr. McKnight had told Respondent that he should not make any statement until he reached Des Moines and that he would then provide information about the location of the body *through Mr. McKnight*. (App. 38, 96).

Third, Mr. Thomas Kelly, an attorney whom Detective Leaming understood to be acting as Respondent's counsel in Davenport, informed Detective Leaming that Respondent was to provide information about the location of the victim's body only after he consulted with Mr. McKnight in Des Moines. (App. 107). And fourth, Mr. Kelly told Detective Leaming that he would "ride back to Des Moines with [Respondent] to make sure his rights are protected," but Detective Leaming refused to permit this. (App. 107-108).[8]

Fifth, Detective Leaming himself testified that on several occasions during the automobile trip, the defendant told him that he would tell "the whole story" *after* he returned to Des Moines and saw Mr. McKnight; nevertheless, Detective Leaming "kept getting what [he] could" before he and Respondent reached Mr.

[7]Moreover, Lieutenant Knox of the Des Moines Police Department stated on cross-examination that before Detective Leaming and Detective Nelson left for Davenport, Mr. McKnight told him that he wanted Respondent "brought back to Des Moines and we'll have conferences here." Abstract of Record, Supreme Court of Iowa, pp. 91-92 (relevant portions appended hereto as Addendum A).

[8]Detective Leaming denied these statements by Mr. Kelly (App. 55, 78), but the District Court and Court of Appeals correctly found that they were made. Supp. App. to Pet., p. A10, 375 F.Supp. at 176; App. to Pet., pp. A7-A8, 509 F.2d at 231. For further discussion of this conflict, see Part V, *infra*.

McKnight. (App. 58, 60, 61). Petitioner argues that these repeated statements by Respondent were "ambiguous" as assertions of a desire to have counsel before providing incriminating information, citing *Frazier v. Cupp*, 394 U.S. 731 (1969). But it is hard to see how Respondent's statements could have been interpreted as anything *but* an assertion that he wanted to have Mr. McKnight present before he gave information about the crime; moreover, quite apart from the fact that it involved a pre-*Miranda* interrogation, *Frazier* is distinguishable from the instance case on several grounds.

In *Frazier*, the defendant did not have counsel; no one had indicated to the police that the police should not question the defendant in the absence of counsel; the defendant had not been formally charged or arraigned; and the defendant's statement that "I think I'd better get a lawyer before I talk any more" was made only once, and after he had already begun to make incriminating statements. In the instant case, however, Respondent's statements were made only after, and in the context of, the other above-described indications that Respondent wished to provide information about the crime only in the presence and with the assistance of Mr. McKnight; obviously, that background removed whatever ambiguity one might have been able to read into Respondent's statements if they had been made in isolation from the other events of that day. Indeed, Detective Leaming's own testimony shows that he regarded Respondent's statements effectively as assertions of a desire to have counsel before providing information:

> Q: Did [Respondent] at any time say he wanted to have an attorney present before he talked to you?
>
> A: Not in that particular manner, no, sir.

> Q: Well, tell us in what manner, Captain.
>
> A: He told me on several times [sic], "When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." That would be the closest he would have come to it.

(App. 58). In any event, whether these statements were even made is not crucial in this case, given the agreement not to question Respondent and the other indications to the police that Respondent should have the assistance of his attorney before providing information about the crime.[9]

[9] Although Petitioner seems to question the timing of Respondent's statements that he would "tell the whole story" when he saw Mr. McKnight, (Brief for Petitioner, p. 44), the record in this case shows that at least some of these statements were made before Detective Leaming's efforts to gain information from Respondent through his "Christian burial" speech. Detective Leaming testified that Respondent made his statements several times (App. 58), and that the first time was "not too long after we got on the freeway, after we had gassed up and started. . . ." (App. 65). Moreover, Detective Leaming's testimony about the circumstances leading up to the "Christian burial" speech shows that there was a considerable amount of conversation that preceded that speech—conversation that must have covered a significant amount of time after they "gassed up and got on the freeway." (A. pp. 79-81). Most significantly, Detective Leaming testified that *after* Respondent had stated that he would tell the story after he got to Mr. McKnight, Detective Leaming kept talking with Respondent in an effort to get as much information as he could before they reached Des Moines. (A. pp. 60-61). Either this effort by Detective Leaming included the "Christian burial" speech, or Detective Leaming engaged in further efforts to acquire information that he did not divulge in detail during his testimony. Although the former alternative is the more likely one, for purposes of this case it does not matter which is true. Indeed, as noted in the text *supra*, given the other circumstances of this case, it really is not even crucial whether these statements by Respondent were ever made at all.

In the face of these numerous indications that Respondent should not be interrogated or provide any information about the crime until he consulted with Mr. McKnight in Des Moines, Detective Leaming embarked on a campaign to obtain as much such incriminating information as he could from Respondent *before* they reached Mr. McKnight:

> Q: [By Mr. McKnight] And you know that the defendant had said that he would tell you the story when he got back to Henry T. McKnight?
>
> A: Yes, he did, several times.
>
> Q: But you kept getting what you could before you got to Henry T. McKnight, didn't you?
>
> A: We were talking, Mr. McKnight.
>
> Q: Just answer the questions—
>
> A: But not asking questions.
>
> Q: But you kept getting what you could before you got to Henry T. McKnight?
>
> A: This is true, yes, sir.

(App. 60; see also App. 61).

In order to "get" what he could from Respondent before he could have the assistance of counsel, Detective Leaming initially participated in a conversation with Respondent about a wide range of topics, including Respondent's friends, religion, the police investigation of the defendant's room, youth groups, and playing the piano. Detective Leaming then turned the conversation to a direct appeal to Respondent's personal and religious sympathies, and made an explicit statement that Respondent should show the detectives where the victim's body was located before they reached Des Moines. (Neither Mr. McKnight nor Respondent's right to counsel was mentioned in this connection.) Following this appeal, Detective Leaming told

Respondent that he knew the body was somewhere near Mitchellville, and asked Respondent not to answer then, but to "think about it as we're riding down the road." (App. 79-81). Detective Leaming admitted in his testimony that the purpose of this approach was to get Respondent to tell him where the body was. (App. 92-93, 94, 95).[10]

Subsequently, after Respondent asked the detectives whether they had found the victim's shoes, the detectives asked Respondent if he had put them with the other articles of clothing (App. 81-82, 99-100); what kind of shoes they were (App. 82); at which gas station he had put the shoes (App. 100); and where at the gas station he had hidden the shoes. (App. 71, 100).[11] At no time during the automobile trip did the detectives warn Respondent of his right to counsel or inform Mr. McKnight of their activities, despite the availability of a state-wide radio in a highway patrol car that was following them. (App. 39, 66, 93).

In short, Detective Leaming ignored an agreement with Respondent's attorney that Respondent should not be questioned about the crime; isolated Respondent from counsel; disregarded Respondent's own statements that he did not wish to provide information about the crime until he saw his attorney; and then admittedly attempted to induce Respondent to disclose to him the location of the victim's body before Respondent could see his attorney. Even individually, any of these aspects

[10] There is some suggestion in the Brief for Petitioner and the Brief *Amicus Curiae* that Detective Leaming did not "question" or "interrogate" Respondent. This suggestion is dealt with in Part III(c), *infra*.

[11] In addition, when Respondent asked whether a blanket had been found, Detective Leaming asked whether Respondent had placed it with "the other stuff." (App. 62, 83-84).

of Detective Leaming's conduct would have been constitutionally impermissible; taken together, they constituted a massive and concerted effort to deprive Respondent of the assistance of his attorney during a period that was obviously of crucial importance to the prosecution (and defense) of the crime with which Respondent had been charged.

Had counsel been present, it is of course doubtful that Detective Leaming would even have used his psychological interrogation approach—dramatically illustrated by his "Christian burial" speech—at all. And if he had, counsel could have reminded Respondent about his right to remain silent; reduced the inherently coercive atmosphere of an interrogation in a police car; and, perhaps most importantly, advised Respondent more thoroughly and in context about the advantages, for example in terms of admissibility of evidence at trial, of providing information through counsel rather than directly to the detectives.

While the agreement not to interrogate Respondent is not really necessary to a finding of a Sixth-Fourteenth Amendment violation in this case, it is of special significance. Had this agreement *not* been made, Mr. McKnight might have insisted on riding in the police car to Davenport in order to accompany Respondent to Des Moines; this would have enabled him to counsel Respondent during any attempts by the police officers to obtain incriminating information directly from Respondent and to protect Respondent's rights in the ways suggested in the preceding paragraph. And even without being in the car, Mr. McKnight could have counseled Respondent in more detail by telephone about the possibility of interrogation and about the importance in terms of any subsequent trial proceedings that he not in any circumstances provide any information directly to the police, rather than going through Mr. McKnight.

But the agreement *was* made; and Mr. McKnight should have been able to rely on that agreement in determining what steps he should take to protect Respondent's rights prior to his return to Des Moines. The breaking of the agreement by itself misled Mr. McKnight and interfered with Respondent's right to receive the assistance of his attorney—quite apart from the other infringements on Respondent's right to the assistance of counsel that have been discussed above.

The Sixth-Fourteenth Amendment violations in this case were at least as serious as those in *Massiah v. U.S.*, 377 U.S. 201 (1964). In *Massiah*, the defendant was represented by counsel following indictment. An alleged accomplice, after deciding to cooperate with the police, agreed to have a radio transmitter in his car while he spoke to the defendant. By this device, the police were able to overhear incriminating statements made by the defendant to the accomplice. This Court held that the admission of these statements at the defendant's trial violated his Sixth Amendment right to counsel, in that the statements had been obtained through deception and in the absence of the defendant's attorney.

As both the District Court and the Court of Appeals recognized, Detective Leaming's above-described conduct before and during the automobile trip to Des Moines "deprived [Respondent] of his right to counsel in a way similar to, if not more objectionable than, that utilized against the defendant in *Massiah*. Supp. App. to Pet., p. A13, 375 F.Supp. at 177; *see also*, App. to Pet., pp. A14-A15, 509 F.2d at 234. Petitioner attempts to distinguish *Massiah* on the ground that "*Massiah* [sic] could not have waived his right to counsel because he did not know his incriminating state-

ments were being overheard by law enforcement officers. . . ." (Brief for Petitioner, p. 36). But as discussed in more detail *infra*, there could be—and was—no waiver of Fifth or Sixth Amendment rights in this case. Moreover, the distinction between this case and *Massiah* suggested by Petitioner is not a relevant one; indeed, other distinctions show that the violations in this case were *more* serious than those in *Massiah*.

At best, the fact that the defendant in *Massiah* did not know that the police were overhearing his conversation is irrelevant. Thus, in *McLeod v. Ohio*, 381 U.S. 356 (1965), this Court summarily reversed the defendant's conviction on the basis of *Massiah*, even though the statements at issue in that case were made directly to police officers (in the absence of counsel). The crucial question under *Massiah* is whether the police have elicited incriminating statements in the absence of counsel through deception or other improper conduct. *See, U.S. v. Ash*, 413 U.S. 300, 311 (1973). In *Massiah*, the deception was the placing of the transmitter in the accomplice's car. In the instant case, the police not only deceived Respondent and his attorney by making and then breaking an agreement not to interrogate the defendant, they also denied counsel permission to be present during the automobile trip and disregarded Respondent's own statements that he would provide information *when he saw Mr. McKnight*. Moreover, in *Massiah*, the conversations did not take place in the coercive atmosphere of a police station (or police car).[12]

[12] In addition, the defendant in *Massiah* normally would have had no right to the presence of counsel during conversations with friends or accomplices, and would have had to take his chances in talking to such persons that they would not relay information to the police.

A number of lower court decisions have found violations of the right to counsel in circumstances far less objectionable than the instant case. *See, U.S. v. Clark*, 499 F.2d 802 (4th Cir. 1974); *U.S. v. Durham*, 475 F.2d 208 (7th Cir. 1973); *Taylor v. Elliot*, 458 F.2d 979 (5th Cir. 1972), *cert. denied*, 409 U.S. 884, (1973); *U.S. ex rel. Magoon v. Reinke*, 416 F.2d 69 (2nd Cir. 1969), *affirming*, 304 F.Supp. 1014 (D. Conn. 1968); *U.S. v. Slaughter*, 366 F.2d 833 (4th Cir. 1966); *Lee v. U.S.*, 322 F.2d 770 (5th Cir. 1963). In *Taylor v. Elliot*, for example, police officers transporting the defendant from Georgia to Alabama (prior to *Miranda*) interrogated the defendant in the face of instructions from the defendant's attorney—relayed through the defendant's mother—that the defendant should make no statements until he arrived in Alabama. The court of appeals held that this violated the defendant's right to the assistance of counsel and reversed the defendant's conviction. Detective Leaming's conduct in this case, particularly his violation of the agreement not to interrogate the defendant, obviously was far more offensive to the Sixth Amendment than the conduct of the officers in *Taylor*. *See also, U.S. ex rel. Chabonian v. Liek*, 366 F. Supp. 72 (E.D. Wisc. 1973); *U.S. v. Wedra*, 343 F.Supp. 1183 (S.D.N.Y. 1972); *U.S. v. Springer*, 460 F.2d 1344, 1354-55 (7th Cir.) (dissenting opinion by Mr. Justice—then Circuit Judge—Stevens), *cert. denied*, 409 U.S. 873 (1972). Detective Leaming deprived Respondent of Mr. McKnight's assistance as effectively as if he had barred the stationhouse door.

B. Given the Factual Context of this Case, No Waiver of Sixth Amendment Rights Was Possible.

Petitioner does not seem directly to dispute that Detective Leaming's conduct in this case was offensive to the Sixth and Fourteenth Amendments. Rather, Petitioner argues that Respondent "waived" both his Fifth and Sixth Amendment rights before making the incriminating statements that are at issue in this action. This contention is without merit both because waiver was impossible in the context of this case and because Petitioner did not meet his burden of demonstrating a waiver.

The District Court held that "given the factual context of this case. . . . [Respondent] could not effectively waive his right to counsel for purposes of interrogation in the absence of counsel (or at least notice to his counsel . . .)." Supp. App. to Pet., p. A15, 375 F.Supp. at 178. Contrary to Petitioner's assertion, this holding did *not* create a "*per se*" rule that "once an accused has counsel, he cannot effectively waive his right to counsel for purposes of interrogation, absent presence of (or notice to) counsel. . . ." (Brief for Petitioner, p. 35). Such a *per se* rule may be appropriate; a number of lower courts have so held. *See, United States v. Durham*, 475 F.2d 208 (7th Cir. 1973); *Taylor v. Elliot*, 458 F.2d 979 (5th Cir. 1972), *cert. denied*, 409 U.S. 884 (1973); *U.S. ex rel. Magoon v. Reinke*, 416 F.2d 69 (2d Cir. 1969), *affirming*, 304 F.Supp. 1014 (D. Conn. 1968); *U.S. v. Wedra*, 343 F.Supp. 1183 (S.D.N.Y. 1972); *see also, Brooks v. Perini*, 384 F.Supp. 1011 (N.D. Ohio 1973), *aff'd*, 497 F.2d 923 (6th Cir. 1974) (table), *cert. denied*, 419 U.S. 998 (1974); *U.S. v. Springer*, 460 F.2d 1344, 1354-55 (7th Cir. 1972)

(dissenting opinion of Mr. Justice–then Circuit Judge–Stevens), *cert. denied*, 409 U.S. 873 (1972). However, the District Court's "no waiver" holding in this case was carefully limited to situations when

> the police have agreed with the defendant's attorney that the defendant will not be questioned in the attorney's absence, when another attorney has asked to be with the defendant. . . . and when the defendant has repeatedly asserted his desire not to speak in the absence of counsel. . . .

Supp. App. to Pet., pp. A15-A16, 375 F.Supp. at 186.

At least as limited by the District Court, that court's holding that no waiver was possible in this case was clearly correct, for at least three reasons. First, the circumstances enumerated above all point strongly toward *non*-waiver of Respondent's Sixth Amendment rights; when these circumstances are added to the initial presumption against waiver, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), Petitioner's already heavy burden to show waiver simply becomes impossible to meet. Second, when the defendant has counsel and the police have agreed not to interrogate the defendant in the absence of counsel, (and when the defendant's desire to have counsel present before he provides information has been communicated to the police), any subsequent interrogation without counsel is an immediate violation of the defendant's right to have the assistance of counsel during interrogation. Thus, even if an explicit "waiver" were obtained during the interrogation process, it would not be a valid one, since it would be a product of the initial violation of the defendant's rights. Finally, when the police engage in the kind of concerted misconduct that occurred in this case, and especially when their admitted aim is to deprive the defendant of the assistance of counsel during interrogation in violation of

an agreement with counsel, they act at their own risk and must not be permitted to claim "waiver" in an attempt to avoid the consequences of their actions.

None of the above implies that it is not the accused's decision whether to have the assistance of counsel, or that he can never change his mind about asserting his constitutional rights without his attorney's permission. (*Cf.*, Brief for Petitioner, pp. 40, 42). But to say that the accused does not need his attorney's *consent* in order to waive his Fifth and Sixth Amendment rights is not to say that the police may deprive the accused of his previously retained attorney's *assistance* in deciding whether to waive those rights. In this case, Respondent himself had decided that he wished to have the assistance of counsel even before he surrendered in Davenport, and his desire not to provide information about the crime without Mr. McKnight present had been communicated to the Des Moines police. Moreover, Respondent's attorney, as part of his representation of Respondent, had made an agreement with the police that there would be no questioning of Respondent in the attorney's absence. In this regard, Petitioner's emphasis that this agreement was made with counsel, and not with Respondent (Brief for Petitioner, p. 40), is misplaced and misleading: One of the essential functions of counsel is to speak *for and on behalf of his client*, and it was undeniably as counsel for Respondent that McKnight made the agreement with police. The issue is not whether the agreement bound Respondent, but whether it bound the police not to interrogate.

In this context, the initial interrogation of Respondent was immediately a violation of Respondent's right and desire to have the assistance of counsel during interrogation—including assistance in deciding whether

and to what extent to waive his Fifth and Sixth Amendment rights. The fact that a defendant, after careful inquiry to assure a knowing and intelligent waiver, may choose to proceed without counsel, *Faretta v. California*, 422 U.S. 806 (1975), does not mean that law enforcement officials may ignore or violate agreements with counsel whom the defendant has retained and whose assistance the defendant has indicated he wishes to have. "If the right to counsel is to be preserved in any meaningful sense, agreements between counsel and the police involving matters such as interrogation must be lived up to. Cf., Santobello v. New York, 404 U.S. 257 . . . (1871)." Supp. App. to Pet., P. A31, 375 F.Supp. at 186.

None of the lower court cases cited by Petitioner as having "refused to extent the [*Massiah*] decision to the point where no valid waiver can be made in counsel's absence, after counsel is retained" (Brief for Petitioner, p. 37) involved police misconduct of the kind or degree involved in this case. For example, in *United States v. Springer*, 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972), the defendant had turned himself in after learning that there was a warrant out for his arrest on an armed robbery charge. After receiving *Miranda* warnings and signing a waiver of rights form, the defendant gave FBI agents an oral confession. Two days later, the defendant was arraigned and counsel was appointed to represent him. Subsequently, one of the FBI agents, who apparently did not know about the appointment of counsel, again warned the defendant of his rights; the defendant then signed a second waiver of rights and a typed version of the oral statement that he had previously given. A two-to-one majority of the court of appeals held that introduction of the written confession at trial did not violate the defendant's Fifth

and Sixth Amendment rights, primarily on the ground that he had waived those rights prior to signing that confession.

Unlike Detective Leaming, the FBI agent in *Springer* did not violate an agreement with the defendant's attorney; did not ignore instructions not to interrogate the defendant; did not disregard statements by the defendant that he did not wish to make any statements in the absence of his attorney; and indeed did not even know that the defendant *had* an attorney. Moreover, the FBI agent, unlike Detective Leaming, obtained an explicit waiver of the defendant's Fifth and Sixth Amendment rights. Thus, the actions of the FBI agent in *Springer* were far less offensive constitutionally than those of Detective Leaming; and at the same time, the defendant in *Springer* was more willing than Respondent to cooperate with law enforcement officials. But even in the less egregious circumstances of *Springer*, Mr. Justice (then Circuit Judge) Stevens dissented from the majority holding, arguing that the burden was on the FBI agent to find out whether counsel had been appointed and to notify counsel so that he could be present before any interrogation of the defendant took place.

> In a civil context I would consider this behavior unethical and unfair. In a criminal context I regard it as such a departure from "procedural regularity" as to violate the due process clause of the Fifth Amendment.

460 F.2d at 1355.

C. There is No Evidence of Waiver in this Case, and Petitioner therefore has Failed to Meet his Burden of Demonstrating a Waiver.

While an inquiry into "waiver" is unnecessary and inappropriate in this case, such an inquiry nevertheless would not produce a different result, since Petitioner has failed totally to meet his heavy burden of *demonstrating* waiver. "[C]ourts indulge in every reasonable presumption against waiver of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.' " *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In *Faretta v. California*, 422 U.S. 806 (1975), this Court, while holding that a criminal defendant has a right to represent himself, made it clear that the accused cannot waive his right to counsel simply by stating that he wishes to proceed *pro se*. Rather, there must be a showing that the defendant was made aware of "the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and that his choice is made with eyes open." 422 U.S. at 835. *See also, Von Moltke v. Gillies*, 332 U.S. 708 (1948).

Petitioner does not seriously dispute that he bears a heavy burden to demonstrate a waiver by Respondent of his Sixth Amendment rights prior to his statements about the location of the victim and her clothing. Instead, Petitioner contends that this heavy burden was met, basically by the giving of *Miranda* warnings before the trip to Des Moines began, and by Respondent's alleged willingness to give information to the police. (Brief for Petitioner, pp. 49-52.) As the District Court

and the Court of Appeals held, however, these contentions are without merit. Supp. App. to Pet., pp. A21-A24; 375 F.Supp. at 181-83; App. to Pet., pp. A12-A15, 509 F.2d at 233-34.

There is no dispute that *Miranda* warnings were given in Davenport, before the automobile trip to Des Moines began. But these warnings, although probably *necessary* to a finding of a knowing and intelligent waiver of Respondent's Sixth (and Fifth) Amendment rights, certainly are not *sufficient* to show an intentional and knowing relinquishment of those rights during the automobile trip. Obviously, Respondent did make statements after the warnings were given; but this is not to say that before he did so, he intentionally relinquished his right to counsel.[13]

Petitioner's "waiver" argument stresses the assertion that "soon after leaving Davenport, Williams began talking to Detective Leaming. . . ." (Brief for Petitioner, p. 50). Actually, the record is not clear on who initiated the general conversation between Respondent and Detective Leaming; and Detective Leaming conceded on cross-examination that he had earlier testified that he had "made statements to Williams first," apparently on the way to the freeway from the Davenport police station. (App. 94). But in any event, the question of who spoke the very first words after leaving the Davenport police station is not important here. Most of the conversation preceding Detective Leaming's "Christian burial" speech concerned matters unrelated to the crime with which Respondent was charged—such as religion,

[13] The instructions by counsel to Respondent not to make any statements about the crime until he returned to Des Moines (see Brief for Petitioner, p. 50), are irrelevant to waiver for similar reasons.

youth groups, playing the piano, and Respondent's minister and friends. (App. 79-81). Regardless of who initiated this conversation, it showed no willingness on Respondent's part to provide information about the crime. This is equally true of Respondent's questions about the police investigation of fingerprints and his friends' homes (App. 56, 81): Certainly the fact that an accused asks *questions* does not indicate a willingness to provide *information* about a crime in the absence of his attorney. This is especially obvious when the accused has expressed his desire *not* to provide any information until he sees his attorney.

Moreover, regardless of who initiated the conversation between Detective Leaming and Respondent, and regardless of Respondent's questions about the police investigation, it is undisputed that Detective Leaming initiated and directed a portion of the conversation by means of which he admittedly was attempting to obtain information about the crime in the absence of Respondent's counsel. In particular, Detective Leaming played on Respondent's religious and personal sympathies, and stated directly that Respondent should disclose the location of the body before they reached Des Moines. (App. 81). This was done without any previous mention of the body, without any indication on Respondent's part that he wished to provide information, in the face of statements to the contrary, and in violation of an agreement with Mr. McKnight.[14]

[14] It is significant that despite the conversation that preceded the "Christian burial" speech and Respondent's questions about the police investigation, Respondent did not provide any information about the crime until after Detective Leaming's pointed requests—vividly illustrated by Detective Leaming's own testimony about his "Christian burial" speech—that he do so. It is also significant that Respondent did not make any further statements about the crime after he saw Mr. McKnight in Des Moines. (App. 49, 95).

The "spirit of cooperation" by Respondent asserted by Petitioner (Brief for Petitioner, p. 51) is simply contrary to the record, at least in any sense that is relevant to waiver. Respondent's surrender in Davenport certainly was no indication that he wished to provide information about the crime in the absence of counsel.[15] And the testimony of Detective Leaming about the telephone conversation between Mr. McKnight and Respondent (see Brief for Petitioner, pp. 51-52) also shows no willingness by Respondent to provide information about the crime in Mr. McKnight's absence. In fact, the statements by Mr. McKnight that Detective Leaming testified he overheard imply, if anything, a reluctance on Respondent's part to disclose the location of the body under any circumstances; and the portion of that conversation that Petitioner omits from his argument made it clear that Respondent was being told to provide information *after* he returned to Des Moines, and then through Mr. McKnight.[16]

Finally, Respondent's statements about the victim's shoes, the blanket, and the body (see Brief for Petitioner, p. 51) all followed Detective Leaming's purposeful attempts to obtain information from Respondent in violation of his agreement with Respondent's attorney and in disregard of Respondent's own stated desires. As the District Court noted, it is hardly surprising that Respondent's statements were made when they were,

[15] Indeed, Respondent clearly indicated to Lieutenant Ackerman that he did not wish to provide such information until he saw Mr. McKnight in Des Moines, and he did not do so while he was in Davenport. (App. 42-43, 45).

[16] " 'When you get back here, you tell me and I'll tell them. I'm going to tell them the whole story.' " (Testimony by Detective Leaming, quoting Mr. McKnight.) (App. 96).

given that Detective Leaming asked Respondent to tell him where the body was "on the way [to Des Moines]" and then asked the defendant to "not answer" but to "think about it as we're riding down the road." Supp. App. to Pet., pp. A28-A29, 375 F.Supp. at 175.

In short, as the District Court and the Court of Appeals held, except that warnings were given and statements eventually were obtained, there is simply no evidence that Respondent waived his right to counsel either before Detective Leaming embarked on his campaign to obtain information in Mr. McKnight's absence or before Respondent made the incriminating statements that are at issue in this case. Supp. App. to Pet., p. A24, 375 F.Supp. at 182; App. to Pet., p. A12, 509 F.2d at 233. No more evidence of waiver exists here than existed in *Massiah v. U.S.* or *McLeod v. Ohio*, *supra*. Moreover, a number of lower court cases have found no waiver in situations presenting as much or more evidence of waiver than Petitioner has produced in this case. *See, U.S. v. Durham*, 475 F.2d 208 (7th Cir. 1973); *U.S. v. Blair*, 470 F.2d 331 (5th Cir. 1972), *cert. denied*, 411 U.S. 908 (1973); *U.S. v. Slaughter*, 366 F.2d 833 (4th Cir. 1966); *Lee v. U.S.*, 322 F.2d 208 (5th Cir. 1963); *U.S. ex rel. Chabonian v. Liek*, 366 F.Supp. 72 (E.D. Wisc. 1973).

Pitted against the lack of any real evidence of waiver in this case is the considerable evidence of non-waiver discussed *supra*, including the agreement not to interrogate Respondent; the instructions that Respondent should make no statement about the crime until he returned to Des Moines; the Respondent's own statements that he would provide information *after* he saw his attorney; and the fact that Respondent did not provide any information until after Detective Leaming's

interrogation efforts. Especially given this strong evidence against waiver. Petitioner cannot be said to have met any burden of showing waiver, heavy or otherwise.

III.

THE ACTIONS OF DETECTIVE LEAMING ALSO VIOLATED THE REQUIREMENTS OF *MIRANDA V. ARIZONA*.

The foregoing shows that Respondent's constitutional right to counsel was violated in this case quite apart from the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). In addition, Detective Leaming's actions violated the requirements of *Miranda*.

There is no dispute that Respondent was given *Miranda* warnings in Davenport before the automobile trip to Des Moines began, and there is no issue here about the technical sufficiency of the warnings themselves. But *Miranda* does not permit law enforcement officials to interrogate an accused automatically after simply giving the required warnings. Rather, the *Miranda* decision provides that after warnings are given, interrogation may proceed only if the defendant waives his Fifth and Sixth Amendment rights; and an invocation of those rights by the defendant in any manner requires that interrogation cease at that time. In this case, Detective Leaming willfully violated the post-warning requirements of *Miranda* in two respects, either of which required suppression of the evidence obtained by Detective Leaming from Respondent.

A. Detective Leaming Persisted in Interrogating Respondent in the Absence of and without Notice to Respondent's Counsel Despite Statements by Respondent and by Others that he Should Not do so.

The first *Miranda* violation in this action is closely related to the Sixth Amendment violations described in the preceding section of this Brief. In *Miranda*, this Court held that even after proper warnings are given, if the accused indicates that he wishes to see an attorney before making any statements, interrogation must cease *until an attorney is present.*

> At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to the police, they must respect his decision to remain silent.
>
> . . . If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during this time.

384 U.S. at 474.

Detective Leaming's conduct in this case grossly violated the above-quoted guidelines. As discussed in more detail earlier in this Brief, Detective Leaming was informed several times, both by Respondent and by counsel, that Respondent wished to see Mr. McKnight before he provided any information about the crime; moreover, the police had agreed with Mr. McKnight that there would be no questioning of Respondent during the automobile trip. Nevertheless, Detective Leaming did not cease interrogation until Mr. McKnight was

present; instead, he made a concerted effort to obtain as much information as possible from Respondent, especially about the location of the body, before Respondent could consult with counsel. (App. 60, 61, 81).

Neither Petitioner nor the *amici* seriously suggest that Detective Leaming observed the requirements of *Miranda* in this case. Rather, Petitioner argues that the District Court and Court of Appeals "ignored clear facts that demonstrate an effective waiver of rights." (Brief for Petitioner, p. 48). There are at least two serious problems with this argument. First, waiver is not even an issue with regard to the *Miranda* violation described above: When the accused makes a request for counsel, *Miranda* creates a *per se* rule that interrogation must cease *until counsel is present*. Under this rule, the interrogating officer must make no further efforts to overcome the defendant's decision not to talk in the absence of counsel before counsel arrives–lest the request for counsel be nullified. *See, Michigan v. Mosley*, ____ U.S. ____, 96 S. Ct. 321, 329 (1975) (concurring opinion of Mr. Justice White); *see also, Brooks v. Perini*, 384 F.Supp. 1011 (N.D. Ohio 1973, *aff'd*, 497 F.2d 923 (6th Cir.) (table), *cert. denied*, 419 U.S. 998 (1974); *U.S. v. Blair*, 470 F.2d 331 (5th Cir. 1972), *cert. denied*, 411 U.S. 908 (1973); *U.S. v. Priest*, 409 F.2d 491 (5th Cir. 1969).

Of course, even when the defendant has not made any request for counsel after the giving of warnings,

> [i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Miranda v. Arizona, supra, at 475. As argued more fully in Part II, above, Petitioner has failed to meet his burden of demonstrating a waiver by Respondent of either his right to remain silent *or* his right to counsel. In the end, Petitioner can show only that warnings were given and that incriminating statements were made–after Detective Leaming pursued his concerted effort to obtain as much incriminating information as possible from Respondent before he could consult with his attorney. But *Miranda* holds, consistently with *Johnson v. Zerbst*, 304 U.S. 458 (1938), that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." 384 U.S. at 475.

B. Detective Leaming Refused to Cease Interrogation When Respondent Indicated that He Wished to Invoke His Right to Remain Silent Until He Reached his Attorney in Des Moines.

Detective Leaming's purposeful interrogation of Respondent also violated a second, related requirement of *Miranda*. In *Miranda*, this Court held that "when the accused indicates in any manner . . . that he wishes to remain silent, interrogation *must cease*." 384 U.S. at 473-74. The statements by Respondent and his counsel that are described above *and* Mr. McKnight's agreement with the police indicated in the clearest manner that Respondent wished to remain silent until he arrived in Des Moines and saw Mr. McKnight. Nevertheless, Detective Leaming admittedly continued to attempt to obtain incriminating information from Respondent *before* he

reached Mr. McKnight; in short, interrogation did *not* cease.

In *Michigan v. Mosley*, ____ U.S. ____, 96 S. Ct. 321 (1975), this Court held that *Miranda*'s requirement that interrogation cease following an indication of a desire to remain silent did not mean "that a person who has invoked his 'right to silence' can never again be subjected to custodial interrogation by any police office at any time or place on any subject." 96 S. Ct. at 325. Rather, this Court held that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" 96 S. Ct. at 326.

In determining that the defendant's "right to cut off questioning" was "scrupulously honored" in *Mosley*, this Court emphasized that after the defendant's initial statement that he did not wish to discuss the robberies for which he had been arrested, the interrogating officer immediately ceased questioning; that the second interrogation was conducted by another officer at a different place "after the passage of a significant amount of time"; that the defendant was given full *Miranda* warnings at the beginning of the second interrogation; and that the two sets of questioning involved different crimes. 95 S. Ct. at 326-27. None of these factors is present in the instant case: Detective Leaming interrogated Respondent in disregard of all statements that Respondent wished to remain silent during the automobile trip, including those made by Respondent during the trip; without giving fresh *Miranda* warnings; and about the very crime with regard to which Detective Leaming had been told that Respondent wished to remain silent. Moreover, unlike the defendant in *Mosley*, Respondent specified how long he wished to

remain silent, viz., until he saw his attorney in Des Moines. Given the distance between Davenport and Des Moines, this did not shut off questioning for an uncertain or unreasonable length of time; and Detective Leaming's attempts to obtain information specifically before they reached Mr. McKnight did not honor, scrupulously or otherwise, Respondent's exercise of his right to cut off questioning.[17]

C. Detective Leaming's Conduct Included "Interrogation," and his Violations of Miranda v. Arizona Were Not Merely Technical, But Were Willful and Concerted Efforts to Deprive Respondent of his Rights.

The *amici* in this case suggest that Detective Leaming did not "willfully" seek to violate Respondent's rights, and that his statements to Respondent did not constitute "questioning". (Brief *Amicus Curiae*, pp. 8, 10). Moreover, Petitioner suggests that Detective Leaming did not subject Respondent to "psychological interrogation." (Brief for Petitioner, p. 19). The record refutes all of these contentions.

In this case, Detective Leaming himself admitted that he was trying to obtain as much information as possible

[17] Detective Leaming also violated the *Miranda* guidelines by failing to repeat *Miranda* warnings after Respondent mentioned the victim's shoes and before Detective Leaming and Detective Nelson questioned Respondent about those shoes. (App. 72, 81-82, 99-100). Supp. App. to Pet., pp. A18-A19, 375 F.Supp. at 180. Even after an initial warning of rights is given, "[o]pportunity to exercise these rights must be afforded . . . throughout the interrogation." 384 U.S. at 478; *see also, U.S. v. Nielsen*, 392 F.2d 849 (7th Cir. 1968).

before Respondent had a chance to consult with Mr. McKnight, despite the many indications from Mr. McKnight, from Lieutenant Ackerman, from Mr. Kelly, and from Respondent that he should not do so, and despite the agreement with Mr. McKnight that Respondent would not be questioned. In short, this is not a case in which the police inadvertently failed to follow narrow, "technical" requirements of *Miranda*; Detective Leaming's efforts to obtain information from Respondent in the absence of counsel can only be regarded as a willful (and successful) attempt to deprive Respondent of his constitutional rights.

Moreover, whether Detective Leaming "asked questions" in a strictly semantical sense, his statements to Respondent, which admittedly were aimed at obtaining information from him, constituted interrogation for constitutional purposes. In particular, the "Christian burial" speech, although it contained no question marks, told Respondent that "we should stop and locate [the body] on the way in," and asked Respondent to "think about it as we're riding down the road." (App. 81). Moreover, the record shows that both Detective Leaming and Detective Nelson asked questions about the location of the victim's shoes at and around the "Grinnell exit." (App. 72, 81-82, 99-100). Quite apart from punctuation, the "Christian burial" speech was as much interrogation as the questions that were asked later about the victim's shoes. For Fifth and Sixth Amendment purposes, what is important is whether law enforcement officials attempt to obtain information from the defendant in the absence of counsel—and not whether their statements end with question marks.

IV.

MIRANDA V. ARIZONA SHOULD NOT BE OVERRULED IN THIS CASE.

Perhaps because they recognize that Detective Leaming's conduct in this case violated the most fundamental aspects of *Miranda v. Arizona*, 384 U.S. 436 (1966), both Petitioner and the *amici* call for the overruling (or reexamining) of that decision. But since the voluntariness issue that was litigated below but not raised in this Court disposes of this case, and since Detective Leaming's conduct violated the Sixth and Fourteenth Amendments quite apart from the requirements of *Miranda*, overruling *Miranda* would be futile and inappropriate in this case. Moreover, nothing in this case or in the history of the enforcement of *Miranda* indicates that that decision should be overruled; and such an action would be improper both constitutionally and pragmatically.

Petitioner and the *amici* point to four alleged aspects of this case as supporting the overruling of *Miranda*, or at least the modification of that decision so as not to apply herein: "a crime of the most heinous nature; the obvious guilt of the Defendant; difficulty, if not impossibility, of a successful retrial; and a complete lack of any sort of wilful or concerted misbehavior on the part of the police." (Brief of *Amicus Curiae*, p. 10; see also Brief for Petitioner, pp. 14-23). Each of these asserted justifications for "reexamining" *Miranda* is either factually incorrect or legally irrelevant—or both.

No one could question that the crime involved in this case was "most heinous." However, references to the "obvious guilt of the Defendant" are at best misleading. On this record, the evidence that Respondent removed

the victim's body from the Des Moines YMCA and placed it in a field outside Des Moines is undisputed. But Respondent, despite his eventual uncounseled disclosures to the police about the location of the victim's body, has never confessed to committing the murder. (App. 95). In this regard, Petitioner's assertion that "there has never been a hint of [sic] suggestion of any other suspect" (Brief for Petitioner, p. 28) is simply and categorically wrong: Both prosecution and defense testimony at trial established that one Albert Bowers, a maintenance man at the YMCA, also was seen in the area of the crime at the time it must have occurred, and defense counsel's examination of the witness clearly was designed to suggest the possibility that Mr. Bowers committed the murder. (See R. 49-51, 62, 190, 191-92, 193-96).[18] The police apparently did not seriously pursue the possibility of Mr. Bowers' guilt, and he left Des Moines shortly after the crime. (R. 62, 82, 137).[19]

But all of this concern with Respondent's guilt and the heinousness of the crime is, of course, irrelevant to

[18] "R." refers to the Abstract of Record which was filed in the Iowa Supreme Court in connection with Respondent's appeal to that Court, and which is part of the record in this Court. The portions of the Record referred to above were not included in the Single Appendix, and are not included as an Appendix to this Brief, because the points to which they are relevant are so peripheral to the real issues in this action.

[19] The police found hairs on the body of the victim, and took extensive hair samples from Respondent. Apparently, no hair samples were taken from Mr. Bowers. At trial, the prosecution introduced no evidence concerning the hair samples taken from Respondent; on cross-examination, one of the prosecution witnesses testified that he had sent the hair samples to the FBI, but that he did not know where they were at that time. (R. 100).

the constitutional issues in this case. The "logic" of Petitioner's argument would imply that the police may deprive those they believe are guilty of "heinous" crimes of the assistance of counsel and the right to remain silent. But these fundamental rights are not dependent on a finding that the accused is innocent; in order to be effective, they must be afforded every person accused of crime—and perhaps most especially to those accused of heinous crimes, with regard to which the temptation to bypass the rule of law may be the strongest. That evidence may establish the guilt of the Defendant does not justify the use of unconstitutional and unfair methods to obtain it.

The assertion that conviction on retrial would be "difficult, if not impossible" is both speculative and immaterial. There is of course no question that the evidence at issue here was highly significant to the State's case; but that is not to say that retrial would be impossible without it. The statements that are at issue in this case went only to whether Respondent knew where the body was; on that issue, the State still has other evidence that would not be affected by the decisions of the District Court and Court of Appeals. (See Brief for Petitioner, pp. 4-5.) Moreover, whether evidence relating to the body itself would be suppressed as derivative of Respondent's statements (see Brief *Amicus Curiae*, p. 6) is simply not at issue in this case; if the importance to the State's case is relevant to whether *that* evidence should be suppressed, then that is at best a consideration for the state courts on retrial.

But even if this case involved *all* of the evidence against Respondent, that would not be sufficient reason to approve the myriad, concerted violations of Respondent's Fifth and Sixth Amendment rights that

have been described *supra*. Moreover, if the "release of [Respondent] would present a very real danger to society," protection from the eventuality need not come from retrial and conviction. *See, e.g.*, Chapters 225A, 229 Code of Iowa (1973).

The most patently fallacious assertion by Petitioner and the *amici* is that there was a "lack of any sort of wilful or concerted misbehavior on the part of the police." (Brief *Amicus Curiae*, p. 10; see also Brief for Petitioner, pp. 19-21). As argued more fully in Part III(C) of this Brief, *supra*, Detective Leaming deliberately set out to pry as much information as possible out of Respondent before he could consult with his attorney, in violation of an agreement with Respondent's attorney and in the face of repeated indications that Respondent wished (a) to remain silent (b) until he saw his attorney. This was not a mere technical "slip-up" on Detective Leaming's part; his behavior can only be characterized as a willful disregard of Respondent's Fifth and Sixth Amendment rights.

The arguments by Petitioner and *amici* that the *Miranda* decision has had an adverse impact on the effectiveness of law enforcement (Brief *Amicus Curiae*, p. 10) and that it essentially precludes the use of confessions in criminal cases (Brief for Petitioner, p. 15) are unsupported and unsupportable. The statements of commentators quoted by Petitioner (Brief for Petitioner, pp. 21, 22, 25, 28-29), all were made within a year of the *Miranda* decision. At the time of the *Miranda* decision, as the dissenting opinions forcefully argued, 384 U.S. at 516-17 (opinion of Harlan, J.), 541-43 (opinion of White, J.), there was some reason to fear that inflexible application of the *Miranda* guidelines might impair law enforcement efforts by excluding from evidence virtually all confessions. However, the

subsequent implementation of *Miranda* has not excluded all confessions, and the *Miranda* procedures have not had a serious overall impact on the effectiveness of law enforcement.[20]

Soon after *Miranda* was decided, one of the *amici* in this case concluded that it did not appear that "the *Miranda* requirements will create any significant difficulties in the prosecution of future cases."[21] Experience has borne out that prediction. This may be due in part to the fact that interrogations and confessions are not essential tools in the great majority of criminal prosecutions.[22] In addition, scholarly research indicates that it is far from impossible for law enforcement officials to obtain valid confessions under *Miranda*;[23] and this is confirmed by the cases reaching this Court in which confessions are held admissible.[24]

[20] *See*, Seeburger and Wettick, *Miranda in Pittsburgh: A Statistical Study*, 29 U. Pitt. L. Rev. 1, 23, 26 (1967); Younger, *Effect of Miranda Decision on the Prosecution of Felony Cases*, 5 Amer. Crim. L. Q. 32, 34 (1966).

[21] Younger, *Some Views on Miranda v. Arizona*, 35 Fordham L. Rev. 255, 262 (1966).

[22] *See*, Project, *Interrogations in New Haven: The Impact of Miranda*, 76 Yale L.J. 1519, 1523, 1573-74, 1584-87, 1592 (n.196) (1967); Seeburger and Wettick, *supra* note 20, at 15, 26; Younger, *supra*, note 20, at 33.

[23] *See*, Medalie, Zeitz, and Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347, 1351-52, (1968); Seeburger and Wettick, *supra*, note 20, at 12; Project, *supra* note 22, at 1523, 1613; Younger, *supra* note 20, at 34.

[24] *See, e.g., Michigan v. Mosley*, ____ U.S. ____, 96 S. Ct. 321 (1975); *Wilson v. Arkansas*, ____ U.S. ____, 96 S. Ct. 451 (1975); *Fred v. State*, 421 U.S. 966 (1975); *Dean v. Mississippi*, 420 U S. 974 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Cannon v. South Carolina*, 414 U.S. 1067 (1974).

This is not to say that *Miranda* warnings have no impact on the interrogation process. It is fair to say that some additional percentage of those persons who are arrested for alleged criminal activity will exercise their Fifth and Sixth Amendment rights upon being informed of them.[25] But any constitutional right of the accused–particularly the Fifth and Sixth Amendments–will have some impact on the ability of the prosecution to obtain a conviction; that is of course the basis of our constitutional, adversary system of justice. And in any event the *Miranda* decision was not aimed at having any particular effect on the ability of the police to obtain confessions. Rather, it was designed to protect basic constitutional rights by assuring, to the extent pragmatically possible, that persons facing interrogation while in police custody would be able to know their rights and decide intelligently whether to exercise them. Requiring *Miranda* warnings and then permitting interrogation to follow only if there are reasonable indicia of a knowing and intelligent waiver of rights protects basic Fifth Amendment rights, but is not unduly burdensome and has not proved to seriously impair the ability of law enforcement officials to prosecute criminal cases.

Thus, quite apart from the existence of other independently dispositive issues in this case, overruling *Miranda* would serve no constitutional or pragmatic purpose. At the same time, to overrule or extensively modify *Miranda* would be destructive of the basic protections of the Fifth Amendment, would encourage

[25] *See*, Project, *supra* note 22, at 1523, 1576-78; Medalie, Zeitz, and Alexander, *supra* note 23, at 1372, 1414; Seeburger and Wettick, *supra* note 20, at 11.

the kind of police misconduct that occurred in this case, and would be a gratuitous infringement on the principle of *stare decisis*.

V.

THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY APPLIED 28 U.S.C. §2254(d) IN RESOLVING THE FACTUAL ISSUES IN THIS CASE WITHOUT AN EVIDENTIARY HEARING, PURSUANT TO AN AGREEMENT BY THE PARTIES.

A. The District Court and Court of Appeals Carefully Observed 28 U.S.C. §2254(d)'s Presumption of Correctness for State Court Findings of Fact.

By agreement of the parties, the District Court relied entirely on the state trial court record in making its findings of fact and conclusions of law in this case. The District Court paid careful attention to the general presumption of correctness given to state court findings by 28 U.S.C. §2254(d), and none of its factual findings conflicted with those of the state trial court. Supp. App. to Pet., pp. A10, A22, 375 F.Supp. at 176, 181. The District Court did resolve factual issues that had not been resolved by the state trial court, primarily on the basis of the testimony of the police officers who were involved in the events in question, Supp. App. to Pet., pp. A2-A9, 375 F.Supp. at 172-75; this of course was proper under the explicit language of 28 U.S.C. §2254(d)(1). *See also, Townsend v. Sain*, 372 U.S. 293, 313-14 (1963). Moreover, the District Court resolved the constitutional issues differently from the state

courts. Again, this was clearly proper under 28 U.S.C. §2254(d), since that statutory provision gives a presumption of correctness only to state court *factual* findings. This Court has held that constitutional issues must be resolved independently by the federal courts: The state court "cannot have the last say when it . . . may have misconceived a federal constitutional right." *Brown v. Allen*, 344 U.S. 443, 508 (1952). *See also, Townsend v. Sain, supra*, at 318; *Doerflein v. Bennett*, 405 F.2d 171 (8th Cir. 1969).

Petitioner argues that the District Court's conclusion that Respondent "asserted his right or desire not to talk to the police in the absence of his attorney" (Brief for Petitioner, p. 58) violated 28 U.S.C. §2254(d) by conflicting with the state court findings. This argument is faulty on its merits—and even if meritorious, would not affect the validity of the District Court's and Court of Appeals' conclusions on the issue of "waiver".

On this record, there can be no dispute that on several occasions during the trip to Des Moines, Respondent told Detective Leaming that he would tell the whole story *when he saw Mr. McKnight in Des Moines*: Detective Leaming himself so testified, and there was no contrary testimony. As argued more fully in Part II, *supra*, especially in the context of the preceding events of that day, these statements by Respondent could only have been interpreted as an assertion of his desire to have Mr. McKnight present before he provided any information about the crime. In fact, they were so interpreted by Detective Leaming. (App. 58; see pp. 20-21, *supra*). Thus, even if one regarded the state trial court's reference to an "absence on [Respondent's] part of any assertion of his right or desire not to give information absent the presence of his attorney" as a finding of historical fact, it would

plainly be "not fairly supported by the record," 28 U.S.C. §2254(d)(8), and hence not entitled to a presumption of correctness under §2254(d). Supp. App. to Pet., p. A24, 375 F.Supp. at 182, n.5.

Moreover, the District Court's conclusion that Respondent had asserted his "desire not to provide information . . . absent his attorney" was a decision that Respondent's undisputed statements to Detective Leaming were legally sufficient to require that Detective Leaming not pursue interrogation further until they reached Mr. McKnight. In short, this conclusion involved the constitutional significance of the undisputed historical facts—and hence was not subject to §2254(d)'s general presumption of correctness.

> "Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, . . . the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge."

Brown v. Allen, 344 U.S. 443, 507 (opinion of Frankfurter, J.) (1952). *See also, Neil v. Biggers*, 409 U.S. 188, 193, n.3 (1973); *Frazier v. Cupp*, 394 U.S. 731 (1969).

In any event, regardless of whether Respondent made any assertion at all in the police car on the way to Des Moines, the fact that Respondent did not wish to provide information about the crime until he saw his attorney had been communicated to the police, and they had agreed not to question Respondent during the trip. Moreover, as the District Court noted, whether Respondent asserted a desire to have counsel present for interrogation is not really crucial to the issue of

"waiver", since the absence of such an assertion would not demonstrate a waiver by Respondent of his Fifth and Sixth Amendment rights. Supp. App. to Pet., p. A24, 375 F.Supp. at 182.

B. The District Court Properly Based its Findings of Fact and Conclusions of Law on the State Court Record, Pursuant to an Agreement between the Parties.

Petitioner also argues that the District Court erred in not conducting an evidentiary hearing in order to resolve certain factual questions with regard to which there was some conflict in the record. This argument is remarkable in light of Petitioner's own conduct of this case. First, Petitioner specifically stipulated that the District Court *should* resolve the legal issues presented by Respondent's petition for a writ of habeas corpus strictly on the basis of the state court record, without any further evidentiary hearings. Second, when the District Court's memorandum and order granting the writ was issued, Petitioner failed to ask for reconsideration or for further evidentiary proceedings, despite the opportunity to do so. Third, Petitioner did not even complain about the lack of an evidentiary hearing at any time during his presentation of this case in the Court of Appeals. Petitioner's first mention of any claim that an evidentiary hearing should have been held was in his petition to this Court; thus, neither court below was even given an opportunity to pass on the claim.

Although this failure to timely raise it itself disposes of Petitioner's argument that an evidentiary hearing should be held, the argument in any event is invalid on its merits. *Townsend v. Sain*, 372 U.S. 293 (1963),

relied on by Petitioner, does not stand for the proposition that an evidentiary hearing always must be held by a district court considering a federal habeas corpus action regardless of the desires of the parties. Indeed, following the language quoted by petitioner, this court stated in *Townsend* that "either party may choose to rely solely upon the evidence contained in the state court record . . ." 372 U.S. at 322. Consistently with that language, in *Neil v. Biggers*, 409 U.S. 188 (1973), this Court made an independent determination that certain state line-up procedures had not been unreliable, on the basis of the state court record. And, as the language quoted by Petitioner itself indicates (Brief for Petitioner, p. 63), the court in *U.S. ex rel. McNair v. New Jersey*, 492 F.2d 1307 (3rd Cir. 1974), merely held that the government should be given an *opportunity* to present evidence in a habeas corpus proceeding; in this case, Petitioner explicitly chose to submit the case on the state court record, and did not ask for an opportunity to present evidence even when the District Court issued its memorandum and order.

A review of the state court record clearly supports the resolutions made by the District Court (and approved by the Court of Appeals) of the factual matters that were not resolved by the state trial court. For example, the conflict between Detective Leaming and Mr. Kelly (a) over whether Mr. Kelly told Detective Leaming that Respondent was to make statements about the crime only after reaching Mr. McKnight, and (b) over whether Mr. Kelly was denied permission to ride with Respondent to Des Moines were properly resolved by the District Court in Mr. Kelly's favor: On the one hand, Mr. Kelly was a duly licensed attorney with no personal stake in the outcome of the case; on the other, Detective Leaming did have a professional

stake in whether Respondent's efforts to suppress his disclosures about the location of the body succeeded, and the state trial court had expressed doubts about Detective Leaming's "candor". (App. 2) Especially when the parties have agreed to submit the case on the state court record, it is appropriate for a federal district court to consider the interests of the witnesses and the state court's findings with regard to credibility in resolving factual issues. *See*, Note, *Developments in the Law: Federal Habeas Corpus*, 84 HARV. L. REV. 1038, 1134-35 (1970); *Jackson v. U.S.*, 353 F.2d 862, 866 (D.C. Cir. 1965).

Moreover, contrary to Petitioner's assertion (Brief for Petitioner, p. 66), the District Court did not resolve the issue of the timing of Detective Leaming's "Christian burial" speech simply by saying that Petitioner had the burden of showing what the timing was although there is no dispute that Petitioner did have that burden. Rather, the District Court, after reviewing Detective Leaming's own testimony, concluded that that speech must have occurred some time after departure from Davenport—primarily because of the large number of other topics Detective Leaming discussed with Respondent before he made the speech. And the District Court concluded that the precise timing of Detective Leaming's "Christian burial" speech was not very important anyway, given the interrogation approach

Detective Leaming had used. Supp. App. to Pet., pp. A28-A29, 375 F.Supp. at 185.[26]

In short, the District Court correctly found the facts in this case on the basis of the state court record, giving careful deference to the factual findings of the state trial court under §2254(d). And in any event, even if every quarrel raised by Petitioner about the record were resolved in his favor and against the judgments made by the District Court and the Court of Appeals, the result in this case would not be different: Even if one assumes that Mr. Kelly did not exist at all, Detective Leaming violated an agreement with Mr. McKnight that Respondent should not be questioned, ignored indications that Respondent did not wish to speak until he saw Mr. McKnight, appealed to Respondent's known psychological weaknesses, and made statements to Respondent that called for incriminating information—all with the specific purpose of getting as much information as he

[26]Petitioner's complaints about the District Court's findings with regard to Detective Leaming's knowledge that Respondent was a religious person (Brief for Petitioner, p. 65) are answered by Petitioner's own discussion of the facts (Brief for Petitioner, pp. 12-13). In addition, the record clearly supports the District Court's conclusion that Detective Leaming did not tell Respondent the truth about his "knowledge" that the body was near Mitchellville (*cf.*, Brief for Petitioner, p. 66). Indeed, Detective Leaming conceded on cross-examination that he did not tell Repsondent the truth "one thousand percent" about his Mitchellville "theory", and that his non-truth was told in an effort to get Respondent to provide information before he reached Mr. McKnight. (App. 93-94). In any case, these points are not important to the legal issues raised in this Court, and were not emphasized by either the District Court or the Court of Appeals.

could from Respondent before Respondent reached his retained attorney. Any of these facts shows a violation of Respondent's Fifth and Sixth Amendment rights.[27]

CONCLUSION

Since Petitioner has not challenged the lower courts' decision that Respondent's statements were involuntary, and since that decision disposes of this case regardless of the issues that were raised in the petition for certiorari, this Court should affirm without reaching those issues. Moreover, even if the issues raised by the petition are reached, affirmance must follow, since under any view of the record, Detective Leaming purposefully deprived Respondent of the assistance of his previously retained counsel, in violation of the Sixth and Fourteenth Amendments, and violated the requirements of *Miranda v. Arizona, supra*.

Reversal of the judgments of the District Court and Court of Appeals would inform the police that so long

[27] Petitioner's invocation of the concepts of "comity" and "abstention" (Brief for Petitioner, pp. 69-73) is totally misplaced in this action. Those concepts are not applicable to federal habeas corpus actions in which the petitioner has exhausted available state remedies, and have not been applied by this Court to such actions. *See, e.g., Lefkowitz v. Newsome*, 420 U.S. 283 (1975); *Francisco v. Gathright*, 419 U.S. 59 (1974); *Robinson v. Neil*, 409 U.S. 505 (1973); *Townsend v. Sain*, 372 U.S. 293 (1963); *Brown v. Allen*, 344 U.S. 443 (1952). In any case, Petitioner did not raise this issue either in the lower courts or in his petition in this Court, and hence the issue is not properly before this Court. *See, Strunk v. Illinois*, 412 U.S. 434 (1973); *McCullough v. Kammerer Corp.*, 323 U.S. 327 (1945).

as they state *Miranda* warnings with technical correctness, they may then completely disregard the existence of defense counsel in criminal cases–and indeed may take affirmative steps to evade counsel's efforts to assist and protect the accused. Such a result would be destructive of basic Fifth and Sixth Amendment rights and would make it impossible for counsel to represent their clients in a sensible and effective manner in criminal cases.

For the reasons stated above, the judgment of the Court of Appeals should be *affirmed*.

Respectfully submitted,

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ADDENDUM A

[Excerpt from testimony at trial]

DON E. KNOX, JR.

Called as a witness on behalf of the plaintiff, testified as follows:

CROSS EXAMINATION

BY MR. MCKNIGHT:

* * *

Q: Now don't you recall me having called you that morning and you said Captain Leaming wasn't on duty?

A: Yes, sir.

* * *

Q: What time was it?

A: Approximately 8:05 A.M.

* * *

Q: Do you recall the conversation that you and I had about arranging to have the Defendant brought back to Des Moines?

A: Yes.

Q: Do you recall that I said I want him brought back to Des Moines and we'll have conferences here?

A: Yes.

Q: You remember that?

A: Yes.

[Mr. Knox was a Lieutenant of Detectives on the Des Moines Police Department].

In The

Supreme Court of the United States

October Term, 1975

—o—

No. 74-1263

—o—

LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS, a/k/a ANTHONY ERTHEL WILLIAMS,

Respondent.

—o—

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

—o—

REPLY BRIEF OF PETITIONER

—o—

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REPLY BRIEF OF PETITIONER

—o—

ARGUMENT

I.

Respondent misstated what he said about talking to the police in the presence of his lawyer.

Respondent's statement of the facts is for the most part accurate. But he misstates the record on at least one point which could mislead the Court. At page 5 of Respondent's Brief, he says that Lieutenant Ackerman of the Davenport police department "did not question [Williams]

after Respondent indicated that he did not wish to make any statement in the *absence of Mr. McKnight* (App. 42-43, 45)." (Emphasis added.)

The actual statement by Lieutenant Ackerman was that "[Williams] didn't wish to say anything because—until he *talked* to his attorney in Des Moines." (A. p. 43). (Emphasis added.)

The inference suggested by Respondent is that Williams said that he would talk to the police only if and while his attorney was present, and not in his absence. But the record does not support this inference. According to Lieutenant Ackerman, Williams wanted to talk with his lawyer in Des Moines before making any statements to the police. Thereafter, Williams *did* talk to his lawyer by telephone and was advised, among other things, that he would have to tell the police the location of the body:

> "A. Well, I heard him say that, 'You have to tell the officers where the body is,' and he repeated a second time, 'You have got to tell them where she is.' He then said, 'It makes no difference, you have got to tell them, you have already been on national hook-up.' He said, 'What do I mean by national hook-up? I mean you have been on television nationally, so that makes no difference. You have got to tell them where she is.'" (A. 96).

Respondent relies on this misstatement of fact at several places in his brief. See Respondent's Brief pp. 5, 15, 22, 32 (footnote 15), 40 and 49. Understandably, Respondent is attempting to bolster his arguments but the truth does not support them.

II.

The issue of voluntariness is before this Court.

Respondent Williams, in Division I of his brief, contends Petitioner has not appealed the finding of Judge Hanson that his statements were involuntary. This just isn't true.

Repeatedly throughout Petitioner's brief Petitioner argues that Williams' statements "were purely voluntary and untainted by the slightest coercion" (P. 15); "spontaneous or *voluntary*" (P. 16); were "not subject to psychological interrogation" or "physically threatened" or "run through menacing police interrogation procedures" (P. 19); "not physically abused" (P. 20); Williams "*freely* directed the police to the little girl's body" (P. 21); "Williams' statements simply were not 'compelled' they were volunteered" (P. 21).

Division V, commencing at page 37 of Appellant's (Brewer's) brief in the United States Court of Appeals for the Eighth Circuit, is devoted entirely to appealing Judge Hanson's decision on voluntariness. The Circuit Court decided only the waiver issue and that Williams was denied the right to counsel (App. A, Pet. for Writ, pp. A14 and A15). It did not address the voluntariness issue. That issue was, and remains, one of the primary issues of this case. It is implicit in the petition for writ of certiorari which was granted by this Court. There are simply no facts upon which Judge Hanson could reasonably conclude that Respondent Williams' acts and statements were involuntary. Nor is there any way in which Petitioner could do more to challenge Judge Hanson than he has

done, except to jump up and down, tear his hair and scream. Petitioner has even gone so far as to ask this Court to reconsider and overturn the new voluntariness requirements of *Miranda v. Arizona,* 384 U. S. 436 (1966) to allow trickery and deceit.

Petitioner not only raised the voluntariness issue, he suggested that this Court adopt the standards of Title 18 U. S. C. § 3501, Omnibus Crime Control and Safe Streets Act of 1968, or similar standards to determine voluntariness of self-incriminating statements. Petitioner's Brief, p. 23.

Even if Respondent is serious in this argument, he has raised the issue too late. Rule 24 (1), Rules of the Supreme Court, provides that Respondent must, in his brief in opposition to a petition for writ of certiorari, disclose any matter or ground why the cause should not be reviewed by this Court. In *Weiner v. United States,* 357 U. S. 349 (1958) this Court refused to consider an issue raised by the government because the government did not comply with Rule 24 (1) in its response to the Petition for Certiorari. Cf. *Cheever v. Wilson,* 9 WALL. 108, 19 L. Ed. 604 (1870); *The Camanche v. The Coast Wrecking Company of New York (The Camanche),* 8 WALL. 448, 19 L. Ed. 397 (1869). If, as Respondent suggests on page 11 of his brief, Petitioner's failure to raise the voluntariness issue after Judge Hanson was affirmed, "disposes of the entire case and requires reversal of Respondent's conviction" he should have pointed that out in timely fashion in Resistance to the Petition for Certiorari.

Even assuming this Court determines that we have not strictly complied with Rule 23 (1), Rules of the Supreme

Court, this Court has broad discretion to determine the issue of voluntariness on the merits. Certainly, Respondent can claim no surprise and he would not be adversely affected by a decision on the merits. This is not a case in which the issue was never presented. Voluntariness is inseparable from the other questions herein.

This Court has always attempted to resolve the ultimate issues of a case even if not presented by the parties. In the landmark case of *Erie R. Co. v. Tompkins,* 304 U. S. 64 (1938), this Court overruled a prior decision of years standing although neither party urged such a holding. The Court has inherent power to determine a case upon issues never discussed in any Court that considered the case. In *Terminiello v. Chicago,* 337 U. S. 1 (1949) the dissents of Justices Vinson and Frankfurter point out that the majority decided the case on an issue that was not raised in the trial court, in two Illinois appellate courts, in the petition for certiorari or the briefs in the Supreme Court, and was explicitly disclaimed on behalf of the petitioner at the bar of this Court.

The question of voluntariness is crucial to the final adjudication of this case. The Court has consistently confronted such important issues even where the rules were not strictly observed. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, et al.,* 402 U. S. 313 (1971); *United States v. Arnold Schwinn and Co.,* 388 U. S. 365 (1967); *Boynton v. Virginia,* 364 U. S. 454 (1960); *Duignan v. United States,* 274 U. S. 195 (1927); *Cheever v. Wilson, supra.*

III.

Respondent's incriminating statements and acts were spontaneously volunteered and not in response to police interrogation.

At page 40 of Respondent's Brief, Respondent suggests that Williams was "interrogated" in the sense contemplated by this Court in *Miranda v. Arizona,* 384 U. S. 436 (1966). Respondent points to the "Christian burial" speech of Detective Leaming (App. 81) and subsequent questions by Detective Leaming and Detective Nelson *after* Williams initially stated to the Detectives (without prompting by the officers) (1) "Did you find her shoes?", (2) "Did you find the blanket?", and (3) "I am going to show you where the body is." (App. 72, 81-82, 99-100).

In reply to Respondent's assertion that Williams was "interrogated," Petitioner wishes to submit that (1) there was no "custodial interrogation" as contemplated by this Court in *Miranda* preceding the statements made by Williams to the officers, (2) the statements by Williams were *volunteered* to the officers and thus not proscribed by *Miranda, see,* 31 A. L. R. 3rd 565, 676-680 (1970), and (3) that any subsequent questions by the officers *after* Williams' initial statements were merely designed to pursue the line of inquiry begun by Williams, and which were also not proscribed by *Miranda.* See, *United States v. Hopkins,* 433 F. 2d 1041 (5th Cir. 1970); *Smith v. Peyton,* 295 F. Supp. 1379 (E. D. Va. 1968); *United States v. Pauldino,* 482 F. 2d 127 (7th Cir. 1973).

Miranda defines "custodial interrogation" as "questioning *initiated by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona,* supra, 384 U. S. at 444. It is elementary under this definition that statements made by an accused *not in response to any questions by the police* are not made during "custodial interrogation." The *Miranda* holding does not apply to statements or confessions *volunteered* to police officials. The *Miranda* Court first stated: "We deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation." *Miranda v. Arizona, supra,* 384 U. S. at 439. Later the Court states:

> "Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence.
>
> . . .
>
> "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda v. Arizona, supra,* 384 U. S. at 478.

The record in this case demonstrates, contrary to Respondent's assertion, either that (1) there was no "custodial interrogation" of Williams at all prior to the time he made the above statements to the authorities, or (2) that if the "Christian burial" speech did amount to "interrogation," that such speech was made early during the trip to Des Moines (A. 63, 104) and that Williams' statements were subsequently *volunteered* at least two hours after Leaming's "Christian burial" statement (A. 63, 81 and 104). Thus, it cannot reasonably be argued that the statements were in response to "questioning initiated by law enforcement officers."

CONCLUSION

Respondent's misstatement of an important fact leads to an improper inference that Williams would talk to the police only in the presence of his lawyer.

The issue of whether Williams' statements and acts were voluntary is before the Court.

Respondent's initial incriminating statements concerning the whereabouts of the victim's shoes, blanket, and ultimately the location of her body were volunteered. These statements were not made in response to police interrogation. Any subsequent questions by the officers after Williams' volunteered statements were merely to pursue the line of inquiry begun by Respondent.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

RICHARD N. WINDERS
Assistant Attorney General

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Richard N. Winders, Assistant Attorney General for the State of Iowa, hereby certify that on the 28th day of September, 1976, I mailed three (3) printed copies of REPLY BRIEF OF PETITIONER, correct 1st class postage prepaid, to:

Mr. Robert Bartels
University of Iowa
College of Law
Iowa City, Iowa 52242

I further certify that all parties required to be served have been served.

RICHARD N. WINDERS
Assistant Attorney General

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Attorney for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1975

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BREWER, LOU V. — WARDEN,

Petitioner,

v.

WILLIAMS, ROBERT A. — DEFENDANT,

Respondent.

On Writs of Certiorari, Prohibition, and Mandamus to the United States Court of Appeal for Eighth Circuit

ORIGINAL BRIEF AMICUS CURIAE FOR THE STATE OF LOUISIANA

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ORIGINAL BRIEF AMICUS CURIAE FOR THE STATE OF LOUISIANA

This brief amicus is presented on behalf of the State of Louisiana.

STATEMENT OF FACTS

This case is before the Court on a Writ of Certiorari, Prohibition, and Mandamus to review judgment of United States Circuit Court of Appeal for 8th Circuit in the case of *Brewer v. Williams*, 182 N.W. 2d 396. See also 375 F.Sup. 170 (1974) and 509 F.2d 227 (8th Cir.). Writs accepted December 15, 1975. No. 74-1263.

After his conviction in the Iowa District Court, the Supreme Court of Iowa affirmed the decision at 182 N.W. 2d 396. The defendant took writs to the United States District Court 375 F.Sup. 170 (1974).

This case presents for review the single question of whether a defendant who has been afforded all procedural safeguards as delineated in *Miranda v. State of Arizona*, 86 S.Ct. 1602 (1966), 384 U.S. 478, may nevertheless make a knowing and intelligent waiver of those rights.

ARGUMENT

I.

In *Miranda v. State of Arizona*, supra, defendant was not given a full and effective warning of his rights at the outset of the interrogation process. This Court held that the following measures are required:

> "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given and such opportunity afforded him, the individual may *knowingly and intelligently waive these rights* and agree to answer questions or make a statement." (Emphasis added.)

In the case at bar, the defendant was apprised of his rights twice by the police and once by the District Court Judge before whom he was brought. In *Massie v. Commonwealth of Virginia*, 384 F.Sup. 160, where defendant initiated conversation with a police officer and confessed his guilt and there was no showing that

he was coerced or forced in anyway to make the confession, the confession was held to be a volunteered statement and thus admissable. There is no requirement that police stop a man from talking when he voluntarily and without solicitation wants to confess a crime. *U.S. v. Wiggins*, 509 F.2d 454.

The State of Louisiana respectfully submits that the only issue before this Court is the voluntariness of the defendant's confession. *Hughes v. Swenson*, 452 F.2d 866 (8th Cir. 1971). It has long been held that no *express* words of waiver are needed to effectuate such a waiver. *Hughes v. Swenson*, supra. *U.S. v. Montos*, 421 F.2d 215 (5th Cir.) cert. denied 397 U.S 1022, 90 S.Ct. 1262; *U.S. v. Ganter*, 436 F.2d 364 (7th Cir. 1970); *U.S. v. Hilliker*, 436 F.2d 101 (9th Cir. 1970) cert. denied 401 U.S. 958, 91 S.Ct. 987; *Bond v. U.S.*, 397 F.2d 162 (10th Cir.) cert. denied 393 U.S. 1035, 89 S.Ct. 652.

The record is devoid of any evidence to show that any threats or promises were made to the defendant and no inference can be drawn that such promises or threats were made. As for Officer Leaming allegedly having solicited a confession, the record will show that he specifically told the defendant "not to answer" but to "think about it". The record will also reflect that it was the defendant, not the police, who initiated the conversation.

The State of Louisiana therefore contends that the rule of *Miranda*, supra, is inapposite and ought not be applied to the instant case. Nevertheless, if the

Court finds that the rule of *Miranda*, supra, is applicable to the facts of this case, we respectfully urge this Honorable Court to reconsider the *Miranda* decision in light of the rapid changes which have occurred in the criminal justice system in the decade since the *Miranda* decision.

To paraphrase the words of Justice White, the *Miranda* decision was neither compelled nor even strongly suggested by the language of the Fifth Amendment. Certainly there are other viable alternatives that *Miranda*, supra, proposes. The State of Louisiana urges this Honorable Court to adopt the test fashioned by Justice Clark in his dissent in *Miranda*, supra. That dissent emphasized the "totality of circumstances", coupled with a pre-custodial interrogation warning that the defendent *might* have counsel present at the interrogation. In the absence of warnings, the burden would be on the State to prove, inter alia, that the totality of the circumstances show conclusively that the confession was voluntarily rendered.

CONCLUSION

Because of the seriousness of the issue before the Court, the Attorney General of the State of Louisiana wishes to submit this brief in the form of Amicus Curiae for consideration of the arguments advanced herein. It is the contention of the State of Louisiana that the rules delineated by the case of *Miranda v. State of Arizona*, supra, do not apply to the instant case. Still, if this Honorable Court should find *Miranda*, supra, apposite, the State of Louisiana also respectfully

urges this Honorable Court to reconsider the decision of *Miranda*, supra, in light of other, more viable alternatives now available to this Honorable Court.

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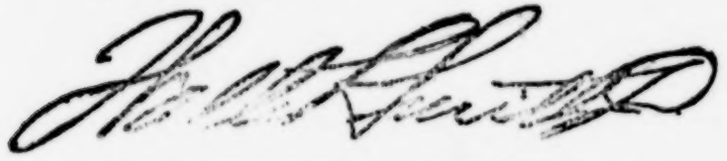

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 74-1263

LOU V. BREWER, WARDEN,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE STATES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, FLORIDA, IDAHO, ILLINOIS, INDIANA, MARYLAND, MISSISSIPPI, NEBRASKA, NEVADA, NEW JERSEY, NEW YORK, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, UTAH, VIRGINIA, WEST VIRGINIA AND WYOMING.

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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Letters of Consent to the filing of AELE, Inc., and the N. D. A. A., Inc., have been received from counsel for the Petitioner and the Respondent and these have been filed with the Clerk of the Court. States are not required to obtain consent to file as *amici curiae*.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness in dealing with crime.

The National District Attorneys Association, Inc., (NDAA) is a nonprofit, non-political, tax exempt corporation composed of approximately 6,000 members representing all 50 states. The purposes of the National District Attorneys Association are, *inter alia,* to improve and to facilitate the administration of justice in the United States and to promote the study of law and legal institutions.

To effectuate these aims the National District Attorneys Association for many years has utilized an Amicus Curiae Committee to file briefs in cases of national importance in the United States Supreme Court. The NDAA seeks to make known the views of all prosecutors in America and to bring before this Court their position on matters affecting the discharge of the duties of prosecutor.

The State Attorneys General filing herewith are the chief law enforcement officers of their respective states with oversight

for the fair and effective enforcement of the criminal law therein.

Because this case presents fundamental questions concerning the ability of the police to secure legally admissible confessions from criminal suspects, each of the *amici* believe that they have a direct interest in the outcome of this case.

ARGUMENT.

I. The Rationale of Miranda v. Arizona Is Too Restrictive and Should Be Abandoned in Favor of a More Flexible Standard.

Amici will not reiterate the legal arguments made by the Petitioner, although we are in complete agreement with them and we wish to associate ourselves with them. *Amici* will confine their argument to a brief consideration of the fundamental issue involved in this important case: whether the rationale of *Miranda* v. *Arizona,* 384 U. S. 436 (1966), as applied by the lower Federal courts is too restrictive and whether it should be abandoned in favor of a more flexible standard for evaluating the admissibility of confessions and other statements of the criminal accused.

To put our argument into perspective we turn to the dissenting opinion of Justice Stuart of the Supreme Court of Iowa in that court's decision which affirmed Respondent's state conviction for murder.[1] Stating that he dissented "reluctantly" and that he personally saw nothing legally or mor lly wrong with permitting police officers to use psychology to secure incriminating statements from a defendant without counsel, Justice Stuart nevertheless felt that *Miranda* v. *Arizona* compelled the reversal of the defendant's conviction.[2]

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1. *State* v. *Williams,* 182 N. W. 2d 396 (1970).

2. *Ibid.,* p. 406. The Judicial gloss on *Miranda* largely reflects precise analysis of concepts like "custody" and "interrogation" and the attendant prophylactics raised. Little, if any, attention is given to the real purposes served by regulating police questioning

Justice Stuart then continued:

> *It seems to me the [Miranda] rule of law is unsound and that in the long run justice would be better served by applying it in accordance with its spirit and exposing the perverse result of its application.*[3]

The United States District Court for the Southern District of Iowa granted Respondent's petition for a writ of Habeas Corpus,[4] which holding was affirmed on a 2 to 1 vote by a panel of the United States Court of Appeals for the Eighth Circuit.[5] Thus, the Respondent's conviction is reversed below and the rigid application of the *Miranda* rule by the two lower federal courts is indeed exposed as a most "perverse result." We submit that the very perverseness of the result in this case should form a basis for this Court to abandon the rigid application of *Miranda* in favor of a much more flexible standard for evaluation of the admissibility of confessions and other statements of criminal suspects.

Support of this contention is to be found in a consideration of the following facts:

1. The Crime Involved Was Most Heinous and Reprehensible.

Even the United States District Court, in granting Respondent Habeas Corpus relief, so characterized the murder of 10 year-old Pamela Powers.[6] The State of Iowa in its Petition for a Writ of Certiorari has set forth some of the details of the sexual assault made upon the child before her death (p. 4). And in addition to the natural repugnance felt at the release of such a murderer, it is clear that the outright release of such an individual would present a very real danger to society.

practices. See Zagel "Confessions and Interrogations After Miranda" (National District Attorneys Association, Inc., 5th Edition, 1975).

3. *Ibid.*
4. 375 F. Supp. 170 (1974).
5. 509 F. 2d 277 (1975).
6. 375 F. Supp. 170 at 186.

2. There Is Overwhelming Evidence of the Guilt of the Respondent.

This fact was again conceded both by the dissenting justices of the Supreme Court of Iowa,[7] and by the United States District Court.[8] This Court is not concerned in the instant case with a situation where there is some doubt as to the actual guilt or innocence of the defendant. If this were a case, for example, in which a confession was beaten or otherwise extorted from a criminal defendant there could well be a legitimate doubt as to his guilt. This is certainly not the situation in the instant case. Respondent led the police to the body of the victim, the location of which he, and only he, was aware. He also told the police of the locations at whch he disposed of the victim's shoes and the blanket in which he had wrapped the body. Since it is unquestioned that the *only* "pressures" used by the police against the Respondent were extremely subtle, it should likewise be unquestioned that this is not by any stretch of the imagination a case in which a false confession has been extorted from an innocent person.

3. A Successful Retrial of the Respondent Will Be Difficult, If Not Impossible.

The murder of Pamela Powers took place on December 24, 1968, and more than seven years have elapsed since the crime was committed. Even if there had been witness testimony to prove guilt beyond a reasonable doubt at the original trial, it would be difficult to retry a defendant after such a time lapse; witnesses may be unavailable, even dead, and certainly there would be an attrition of the accuracy of their recollection by reason of the passage of time.

The state's burden will be increased manyfold if the statements in this case are suppressed because they constitute *the* indispensible evidence linking Respondent with the body of the deceased and with other physical evidence of his guilt. Indeed,

7. 182 N. W. 2d 396 at 406.
8. 375 F. Supp. 170 at 186.

since Respondent led the police to the body of Pamela Powers (and it is problematical if they could have found it in any other way), the prosecution would have difficulty even in proving the death of the victim if this evidence is supressed on the basis of it being derivative of Respondent's statements and demonstrations. As we previously noted, there is overwhelming evidence of Respondents *factual* guilt, but, if most of this evidence is excluded, upon retrial the prosecution will experience extreme difficulty in proving Respondent's *legal* guilt beyond a reasonable doubt.

4. The Conduct of the Authorities in This Case Was Not in Any Way Oppressive.

There is no evidence whatever in the record that the police used any oppressive or coercive tactics towards the Respondent. He was advised of his rights under *Miranda* on three occasions and had consulted with two attorneys. It appears from the record that he made the three statements relating to the locations of the blanket, the shoes, and the body spontaneously and not in response to any sort of questioning. In fact, it appears that his attorney had told him something to the effect that he would have to tell the officers where the body was.[9]

The sole source of *any* conceivable police "misconduct" in this case transpired when Captain Leaming made the statement to Respondent about finding the body. Captain Leaming testified:

> Eventually, as we were travelling along there, I said to Mr. Williams that, "I want to give you something to think about while we're travelling down the road." I said, "Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way to Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."[10]

9. 182 N. W. 2d 396 at 403.

Then, although it is not quoted in the majority opinion of the Eighth Circuit, Captain Leaming testified that he told Respondent:

> *"I do not want you to answer me. I don't want to discuss it any further."*[11]

These statements were made by Captain Leaming to the Respondent *near the outset* of the trip from Davenport to Des Moines. The record indicates that all other conversation initiated by Captain Leaming during the trip was innocuous, and that Respondent, some *two hours later,* as the car neared Grinnell. Iowa, spontaneously stated that he had left the victim's shoes at a nearby gas station, and that he showed the officers where he had left them (although by then they were gone). Respondent similarly volunteered his statements about the location of the blanket and the body.

The only subtle pressure which *might* have elicited Respondent's statements and subsequent demonstrations by him was the single comment by Captain Leaming about his desire to locate the body, which comment was followed by a caution to the Respondent not to answer.[12] The Iowa Supreme Court held that

10. 509 F. 2d 227 at 230.

11. 509 F. 2d 227 at 235 (dissenting opinion).

12. The lower courts noted that Captain Leaming falsely told Respondent that he knew that the body was located near Mitchellville, Iowa. However, This Court has held that a misrepresentation by an interrogator to a suspect need not of necessity vitiate the validity of a confession. *Frazier* v. *Cupp,* 394 U. S. 731 (1969). See also *Michigan* v. *Mosley,* 44 USLW 4015 (1975) in which it was

this was not the sort of conduct which so overbore Respondent's will that, in the totality of the circumstances, he could not have voluntarily waived his right to remain silent. We believe that this is a proper interpretation of the facts and the law, and one that should be adopted by this Court.

When the totality of the circumstances in this case is examined, the picture emerges of a suspect who had been thoroughly apprized of his rights, and who had in fact consulted counsel, making admissions spontaneously and not in response to questioning, some two hours after a police officer had suggested to him that he reveal the location of the body and who had cautioned Respondent not even to respond to that suggestion. We submit that only a tortured, rigid, and entirely unrealistic interpretation of *Miranda* would require the suppression of Respondent's statements in this case.

Much has been made in the lower court opinions of Captain Leaming allegedly "breaking his promise" to Respondent's attorneys, not to question him. If Captain Leaming did wilfully do so, this was certainly ill-advised, but, as Judge Webster pointed out in his dissent from the Eighth Circuit decision below, this should not be held to preclude Respondent from waiving his privilege at a later time. 509 F. 2d 227 at 236.

Additionally we submit that certain facts in the record militate against a finding that Captain Leaming *wilfully* sought to violate defendant's rights.

It is possible, that Leaming believed that he had only promised to refrain from *questioning* Respondent. He did not, in fact, question Respondent; he merely made a statement to him, and then he cautioned Respondent not to respond to the statement. This is more than a matter of semantics. Captain Leaming is not an attorney and the direction to him not to *question* Williams may have, in his mind, meant just that.

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noted that a detective falsely told Mosley that an accomplice had confessed and implicated him; yet the conviction was affirmed. 44 USLW 4015, Ft. 3.

The District Court found that as a matter of *law*, Leaming's statement constituted "interrogation." (375 F. Supp. 170 at 177). But to a layman there could well be a distinction between "questioning" someone and "talking" to him. In other words, Captain Leaming could have believed that his conduct was in compliance with his promise to the attorneys.

Captain Leaming did not engage in any generalized questioning of Respondent. His testimony indicates that when he made his statement to Respondent he was primarily concerned with finding Pamela Powers' body for burial. His statement that he feared Respondent would be unable to find the body if the ground should become snow-covered is lent some credence by the fact that Respondent himself was unable at first to find the correct back road which led to the child's burial site. From the record it appears that Captain Leaming did not initiate any other conversation with respondent as to any aspect of his guilt.

This Court stated in *Michigan* v. *Tucker*:

> *Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.* 417 U. S. 433 at 446 (1974).

We believe that this characterization may well be appropos to the conduct of Captain Leaming.

This Court has, in recent years, recognized that a rigid and uncompromizing adherence to the dictates of *Miranda* can be inimical to the effectiveness of law enforcement. At the same time, the pronouncements of the Court have been to the effect that *fundamental* Fifth and Sixth Amendment rights can be properly safeguarded even though some flexibility has been accorded to the police in the task of investigating crime and, in particular, securing legally admissible statements from criminal

suspects. *Harris* v. *New York*, 401 U. S. 222 (1971); *Michigan* v. *Tucker*, 417 U. S. 433 (1974); *Michigan* v. *Mosley*, 44 USLW 4015 (1975).

Amici have never taken the position that mere expediency in the law enforcement process should be used to justify an erosion of basic Constitutional rights. On the other hand, we believe that a careful concern for the effectiveness of law enforcement has its legitimate place in the determinations of this Court. In the instant case the holdings of the lower federal courts epitomize the adverse impact of *Miranda* upon that effectiveness: rigidity of interpretation, the elevation of form over substance, the irrelevance of guilt,[13] and the continuing microscopic examination of police conduct in search of some slight infraction on the part of the police which necessitates the reversal of convictions and the freeing of the guilty.

The instant case presents a vehicle for this Court to re-examine the entire scope of the Miranda opinion. The factors which we suggest should be of concern in such a re-examination are all clearly present: a crime of the most heinous nature; the obvious guilt of the defendant; difficulty, if not impossibility, of a successful retrial; and a complete lack of any sort of wilful or concerted misbehavior on the part of the police. The last of these factors is perhaps the most important. At the very *worst* the police officer in this case can be accused of making one ill-considered statement to the accused (with a caution not to answer it) out of the presence of his attorneys; at all other times the rights of the accused had been scrupulously observed.

We do not believe that a minor infraction such as this one of the dictates of *Miranda* should be cause for the reversal of the

13. One United States District Court has characterized this aspect of *Miranda* with admirable candor. It stated that the focus of the Fifth Amendment had :

" . . . *been broadened from protecting the innocent, from the possibility of a false confession to protecting the* guilty *from unfair methods of procuring statements from him. United States, ex rel. Chabonian* v. *Leik, Director*, 366 F. Supp. 82 (E. D. Wis. 1973), emphasis supplied.

conviction in a case of this nature. We urge this court to abandon the rigid dictates of *Miranda* and to add an element of flexibility to the good faith efforts of the police to enforce the law. For these reasons we urge the Court to reverse the judgment of the United States Court of Appeals for the Eighth Circuit and to affirm the conviction of Respondent herein.

CONCLUSION.

We believe that the instant case provides this Court with an excellent vehicle to examine the question whether the rigid application of the dictates of *Miranda* v. *Arizona* should continue to require the perverse result which will surely transpire if Respondent's conviction is to be reversed.

Certainly the police conduct in this case was not oppressive or coercive, yet if the decisions of the federal courts below are upheld, a defendant convicted of a most heinous crime, whose factual guilt is patent, must be retired (in circumstances of extreme difficulty for a successful re-prosecution) or must be freed.

We do not believe that *Miranda* should be applied so as to dictate such a result; rather we believe that the rationale of *Miranda* which *does* dictate such a result should be abandoned. We urge this Court to reverse the decision of the United States Court of Appeals and to affirm Respondent's conviction.

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